Selection of Leading Cases

Land Tenures, Land Revenue

and

Prescription

Published by the
University of Calcutta
1921

Selection of Leading Cases

For the use of B.L. Students

[*Published under the Authority of the University of Calcutta*]

Land Tenures, Land Revenue

and

Prescription

Published by the
University of Calcutta
1921

PRINTED BY ATULCHANDRA BHATTACHARYYA,
AT THE CALCUTTA UNIVERSITY PRESS, SENATE HOUSE, CALCUTTA.

CONTENTS

SELECTION OF LEADING CASES.

LAND TENURES, LAND REVENUE AND PRESCRIPTION.

RAJA LELANUND SING BAHADOOR

v.

THE GOVERNMENT OF BENGAL.[1]

[*Reported in 6 Moo. I.A., 101; 1 P.C.J., 505; 4 W.R.P.C., 77.*]

1855.
July, 25.

At the conclusion of the argument, judgment was postponed, and was now delivered by

THE RIGHT HON. T. PEMBERTON LEIGH.—The question to be decided in this case is the validity of a claim made by the East India Company to resume, for the purposes of revenue assessment, against the Raja of Khuruckpore, 755 bighas of land, (between three and four hundred acres), part of his *Zemindary*. Their Lordships had no doubt, at the hearing of the appeal, as to the advice which it would be their duty to tender to Her Majesty; but it was stated that there were ten other suits which would be governed by the present decision, and it was obvious, from the nature of the claim, that if it could be maintained, it might affect a very great extent of land throughout the Provinces included in the Decennial Settlement. Their Lordships were, therefore, anxious to explain fully the grounds of their opinion, and by enabling parties to judge what cases will or will not fall within their decision, to prevent, as far as possible, further litigation.

[1] *Present*:—The Right Hon. T. PEMBERTON LEIGH, the Right Hon. the Lord Justice KNIGHT BRUCE, the Right Hon. SIR EDWARD RYAN, the Right Hon. the Lord Justice TURNER, and the Right Hon. SIR JOHN PATTESON.

1855.

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

The lands sought to be resumed, are of what is called *Ghatwally* tenure, and the great question in the case is, whether lands of this description are liable to be resumed under Regulation I of 1793, sec. 8, cl. 4, relating to *Tannah*, or police establishments.

As the question depends on the effect of the Settlement of 1793, and the changes which were then introduced, it will be convenient to advert to the state of these Provinces, and the mode in which they were administered previously to that time. The three Provinces of Bengal, Behar, and Orissa, were ceded by the Mogul to the East India Company, in the year 1765.

At this time the territorial division of the country was into mouzas, or villages, occupied by Royts; Pergunnahs, each of which included several villages; *Zemindaries*, varying in extent, from a moderate English estate, to Districts equal to or larger than many European principalities. The *Zemindary* of Beerbhoom, which immediately adjoins Khuruckpore, is stated in a document, dated in 1786, to which we shall have occasion to refer, to be twice as large as the Kingdom of Sardinia. Khuruckpore was probably of inferior but still of vast extent.

Many of the greater *Zemindars*, within their respective *Zemindaries*, were entrusted with rights, and charged with duties, which properly belonged to the Government. They had authority to collect from the Ryots a certain portion of the gross produce of the lands. They, in many cases, imposed taxes and levied tolls, and they increased their income by fees, perquisites, and similar exactions, not wholly unknown to more recent times and more civilized nations. On the other hand, they were bound to maintain peace and order, and administer justice within their *Zemindaries*, and, for that purpose, they had to keep up Courts of civil and criminal justice, to employ *Kazees*, *Canoongoes*, and *Tannahdars*, or a police force. But while, as against the Royts and other inhabitants within their territories, many of these potentates exercised almost regal authority, they were, as against the Government, little more than stewards or administrators. Their *Zemindaries* were granted to them only from year to year; the amount of their *jumma*, or yearly payment to Government, was varied, or might be varied, annually; it was an arbitrary sum fixed by the Government officers, calculated upon the gross produce of the *Zemindary* from all

sources, after making an allowance to the *Zemindar* for his maintenance, and for the expenses of the collection and of discharging the public duties with which he was entrusted by the Government. Amongst the lands thus granted to the *Zemindars* were often included lands which had been appropriated to the payment and support of public officers of the *Zemindaries*, or villages included in them. These lands were called *Chackeran* lands; and it appears that under the ancient system such lands were usually exempted from assessment in favour of the *Zemindar*, though they had no legal title to exemption. But there was another class of lands, called *La-khiraj*, which, by reason of a special exemption in a royal grant, or by having been legally devoted to religious uses, or by other means, had become or were claimed by their owners to be free from *Khiraj*, or assessment to the Government.

The police of the country was maintained by means of *Tannahdars*, or police officers, kept by the *Zemindars*, and appointed and paid by them; but, where no other provision existed for their maintenance, the expense was in effect defrayed by the Government, either by direct allowances to the *Zemindar*, or by deduction from his *jumma*, or by excluding from assessment, or assessing below their value, lands appropriated to that purpose by the *Zemindar*.

In addition to the police force thus kept by the *Zemindar*, at the expense of the Government, and which seems to have been usually very inefficient, private individuals and communities were accustomed to keep watchmen for the protection of their persons and property, under the name of *Chokeedars*, and various other names, who were paid by their employers, and from whom no allowance was made by the Government.

Besides the disorder which prevailed generally through the Provinces, particular Districts were exposed to ravages of a different description. The mountain or hill districts in India were at this time inhabited by lawless tribes, asserting a wild independence, often of a different race and different religion from the inhabitants of the plains, who were frequently subjected to marauding expeditions by their more warlike neighbours. To prevent these incursions it was necessary to guard and watch the *Ghats*, or mountain passes, through which these hostile descents were made; and the Mahomedan rulers established a tenure,

1855.

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

called *Ghatwally* tenure, by which lands were granted to individuals, often of high rank, at a low rent, or without rent, on condition of their performing these duties, and protecting and preserving order in the neighbouring Districts.

Nothing could be more deplorable than the state of the Provinces under this system. Murder and rapine were common throughout the country; more than half the lands were waste and uncultivated; and neither the Ryots nor the *Zemindars* had any inducement to improve them, as any increase in their value had only the effect of increasing the Government assessment.

It was considered by the East India Company that the first step towards a better system of Government and the amelioration of the condition of their subjects would be to convert the *Zemindars* into landowners, and to fix a permanent annual *jumma*, or assessment to the Government, according to the existing value, so as to leave to the land-proprietors the benefit of all subsequent improvements.

Accordingly, they determined to make the assessment in the first instance for a period of ten years, with a view to its being ultimately made permanent.

In 1789, the original Rules and Orders for the Decennial Settlement of Behar were issued; the Settlement in the other Provinces being issued in subsequent years.

In 1791, by Regulation LXXII, an amended Code of Regulations relative to the Decennial Settlement of Bengal, Behar and Orissa, was promulgated.

By section 1 of that Regulation it was provided, that a new settlement of the land revenue should be concluded for a period of ten years.

By section 2, it was provided, that it should be at the same time notified to the landowners with whom the settlement might be concluded, that the assessment fixed by the Decennial Settlement would be continued after the expiration of the ten years, and remain unalterable for ever, provided such continuance should meet the approbation of the Court of Directors.

By section 31, it was ordered, that the allowances of the *Kazees* and *Canoongoes*, heretofore paid by the landholders, as well as any public pensions hitherto paid through the

landholders, be added to the amount of their *jumma*, and be in future paid by the Collectors on the part of Government.

The assessment was to be exclusive of all *La-khiraj* lands, whether exempt from *Khiraj* with or without authority.

The *Chaekeran* lands, or lands held by public officers and private servants in lieu of wages, were not to be excluded, but were to be subject to assessment in common with the other lands in the *Zemindary*, the exemption which such lands had previously enjoyed being thus destroyed.

The landholders were declared responsible for the peace of their Districts as therefore, and were to act agreeably to such Regulations on this head as might be thereafter enacted.

The *jumma* was to be fixed by the Collectors on fair and equitable principles, with the reservation of the approbation of the Board of Revenue, to whom he was to report the grounds of his decision.

The Collectors, in fixing the *jumma*, were to adopt the following as a general rule:—that the average product of the land in common years be taken as the basis of the Settlement, and from this deductions be made, equal to the *Malikana* and *Kurcha*, leaving the remainder as the *jumma* of Government.

The *Malikana* is the allowance made to the *Zemindar* for his maintenance, and the disbursements and outgoings allowed to him against his receipts fall under the term "*Kurcha*."

At this period Raja Kadir Ali was the *Zemindar* of Khuruckpore. This *Zemindary* is situated in the Zillah of Bhagulpore, on the frontier of the Province of Behar, and forms a considerable principality including many Pergunnahs and, amongst others, the Pergunnah of Gorda, in which the lands in dispute lie. A very large quantity of lands within this District had been granted by the ancestors of the Raja on the *Ghatwally* tenure before described. In the *Teppa* of Dhumsaeen, a Subdivision of the Pergunnah of Gorda, no less than thirty-five villages were held at this time upon this tenure by *Ghatwals*, and, amongst others, the lands in question by an ancestor of the original defendant in these proceedings.

The extent and particulars of these vast estates, and the nature of the *Ghatwally* tenures, were well known to the Government of Bengal at the time when the settlement was made. Some years before, in consequence of disturbances

1855

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

which had taken place in the country during the time of Kadir Ali's father, the Government had found it necessary to interfere with a military force, and having displaced the then Raja and restored tranquility, had placed the *Zemindary* under the charge of one of their own officers, Mr. Augustus Cleavland, who had the management of it up to the year 1781, about which time Kadir Ali (his father having died) was put into possession of the Raj.

It appears from evidence in the cause (the report of the Collector of Bhagulpore, of the 19th of November, 1813), that Mr. Cleavland, during the time that he was in charge of these estates, had granted no less than 87,084 beghas of land in this and (we presume from the extent) the adjoining District upon *Ghatwa ly* tenure, in conformity with the orders of Government.

It appears from other evidence (in Mr. Sutherland's Report, dated the 8th of June, 1819) that the grants before Mr. Cleavland's time to the *Ghatwals* reserved a payment of two annas per begha, as a fee or perquisite to the *Zemindar*; that some *sunnds* were granted unadvisedly by Mr. Cleavland without such reservation, but that he afterwards insisted on such payment being made to the Government while he was in charge on behalf of the Government, and that all grants subsequently made by the Raja of Khuruckpore contained the same reservation.

In 1789-90 the *jumma* to be paid by Kadir Ali was to be fixed, with a view to the Permanent Settlement. As might be expected, considering the magnitude of the estate, it appears to have undergone great consideration. Every village was enumerated and entered in a register; the deductions and allowances to be made out of the income, and the particulars of the lands to be excepted from the assessment (for some lands, called *Nankar* lands, were excepted), were the subject of correspondence between the Collector of the District and the President and Board of Revenue at Fort William, and finally the *jumma* was fixed at Rs. 65,459 8a. 10½ p.

It is beyond dispute, and, indeed, in this case has been fairly admitted, that the *Ghatwally* lands formed part of the *Zemindary*. It is equally clear that they were included in, and covered by, this assessment. Had they been excluded,

the accounts to show it are in the possession of the Government, and might have been produced; but the contrary is perfectly clear upon the evidence, and indeed is found as a fact in the cause by the Special Commissioner, Mr. Moore, in his judgment of the 17th of May, 1843.

Whether these lands were or were not productive of revenue to the *Zemindar* at this time, is not material; though, if it were important, a careful examination of the evidence has satisfied their Lordships that there was some profit derived from them by the *Zemindar* even in money: but, at all events, he derived the benefit arising from the services of the *Ghatwals*, and enjoyed the valuable right of appointing the individuals, who, with the lands, were to take upon themselves the duties of the office. It was not the intention of the Settlement that no lands should be covered by the *jumma* which did not actually produce income, and, therefore, contribute to increase the *jumma* at that time. On the contrary, probably more than half the lands in the country were waste and unproductive at this period, and one of the main objects of the Permanent Settlement was to bring them into cultivation.

Thus matters continued up to the year 1792. The *Tannukdars*, or public police officers appointed by the *Zemindars*, had been found very inefficient, and the Government had appointed officers of their own to assist in keeping order, who had concurrent jurisdiction with those named by the *Zemindar*. But, in the year 1792, the Government determined altogether to suppress the *Tannahs*, or police establishments, maintained by the landholders, and to take to themselves exclusively the preservation of peace and the prevention of crime by means of a police force of their own, to be established at convenient stations throughout the provinces. As the landholders were to be relieved from the expense to which they were subject for the maintenance of the force now to be suppressed, it was very reasonable that, where allowances for such expenses had been made by the Government, they should no longer be contitued, and the Government, therefore, resolved to reserve the right of discontinuing them, or (where lands had been allowed for the purpose) of resuming them.

To carry these arrangements into effect, Regulations XLIX and L of 1792 were issued.

1855.

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

The preamble of Regulation XLIX recites, in strong language, the disorders which prevailed, and the utter inefficiency and frequent corruption of the *Tannahdars* employed by the landholders.

Section 1 provides that the police of the country is in future to be considered under the exclusive charge of the officers of the Government, who may be specially appointed to that trust. The landowners and farmers of land, who keep up establishments, *Tannahdars* and police officers, for the preservation of the peace, are accordingly required to discharge them, and all landholders and farmers of land are prohibited from entertaining such establishments in future.

By section 2 landholders and farmers are no longer to be held responsible for robberies committed on their respective estates. Provision is then made for the appointment of a police force in different stations throughout the provinces, each under the charge of a *Darogha* or superintendent, and the whole is subjected to the control of the Magistrate.

It is clear that the police force here spoken of is distinct from the *Chokeedars* and village watchmen, for these persons are by the 12th section declared subject to the orders of the *Darogha*, and by the 13th section are ordered to apprehend and send offenders to the *Darogha*, and afford every information to him.

By Regulation L of the same year, 1792, a tax is to be levied within the District of each police-establishment, for defraying its expenses; and the 17th section, which is very important, is in these words (it is a circular addressed to the Magistrate of each District:—"You will report whether the landholders of your District have been allowed any deductions on their *jumma*, or are in the receipt of any money allowances, or hold any lands either free of, or at a reduced, revenue, for the purposes of keeping up *Tannahdars* or other police officers, and also your opinion whether the whole, or any, and what part of such deductions, allowances, or produce of such lands may with equity be brought to the public account, in consideration of the landholders being now prohibited from keeping up such establishment, and Government having taken upon itself the charge of the police."

Nothing can be clearer than this—that the lands referred to, are lands which the *Zemindars* had been permitted by the Government to hold free from revenue, or at a reduced revenue, for the purpose of keeping up *Tannahdars*; not lands which the *Zemindars* had permitted other persons to hold free from rent, or at a reduced rent, or lands which such persons had a right to hold free from rent, or at a reduced rent; and that any lands which were in the first predicament were to be reported to the Government by the Magistrate, together with his opinion, whether it was consistent with equity that the whole or any part of the produce of such land should be brought to the public account; and further, that this provision relates and is confined to a class of officers whom the *Zemindar* is no longer permitted to keep.

Though the Decennial Settlement had been made as to the several Provinces of Behar, Bengal and Orissa under different Regulations, and although as to some of the estates the Settlement had not been entirely concluded in 1793, it was thought right in that year finally to establish its permanency, and for this purpose the celebrated Regulations of 1793 were published.

They were many in number, and after declaring the Settlement, to be now permanent, re-enacted, with some modifications with respect to the three Provinces collectively, the provisions which had been previously made with respect to them separately.

The clause relating to the resumption of allowances which had been made to the *Zemindars* for police establishments, is in these words:—"Regulation I, section 8, clause 4. The *jumma* of those *Zemindars*, independent *Talookdars*, and other actual proprietors of land, which is declared fixed in the foregoing articles, is to be considered entirely unconnected with, and exclusive of, any allowances which have been made to them in the adjustment of their *jumma*, for keeping up *Tannahs*, or police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose; and the Governor-General in Council reserves to himself the option of resuming the whole or part of such allowances or produce of such lands, according as he may think proper, in consequence of his having exonerated the proprietors of land

1855.

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

from the charge of keeping the peace, and appointed officers on the part of Government to superintend the police of the country. The Governor-General in Council, however, declares, that the allowances or produce of lands which may be resumed will be appropriated to no other purpose but that of defraying the expense of the police; and that instructions will be sent to the Collectors not to add such allowances, or the produce of such lands, to the *jumma* of the proprietors of land, but to collect the amount from them separately."

Upon the meaning of this clause the question in this cause depends. It is obvious that it has reference to the Police Regulation of 1792, and to the allowances with respect to which an inquiry was directed to be made in that year. It is unnecessary, therefore, here to repeat the observation already made as to their effect.

By Regulation XXIII of 1793, the same inquiries are directed to be made by the Collectors as had been ordered to be made by the Magistrates in 1792; but, as the language is not precisely the same, it may be as well to state the clause at length. It is section 36, and is in these words:—"The Collectors are to report all allowances that may have been made to the proprietors of land for keeping up police establishments, either by deduction from their *jumma*, or by permitting them to appropriate the produce of lands for that purpose, or in any other mode, which may not have been already resumed, with their opinion how far the whole or any portion of such allowances can with equity be resumed in consequence of the proprietors of lands being exonerated from the charge of keeping the peace, as declared in Regulation XXII of 1793": which Regulation had re-enacted the provisions of Regulation XLIX of 1792.

The same provision with respect to *Chackeran* and *La-khiraj* lands which had been contained in the Regulations of 1789 are repeated in those of 1793, namely, that the *Chackeran* lands should be included in the Settlement, and the *La-khiraj* lands excluded from it.

Although both the *La-khiraj* lands and the *Tunnakdary* lands are reserved for further inquiry under these Regulations, there was obviously a great distinction between them with respect to the period at which the decision relating to them ought to be made.

The *La-khiraj* lands were separate from the *Zemindary*, and were excepted out of the Settlement. The validity of the exemption claimed for them depended on the validity of the grant under which it was claimed. Very many of the grants were believed to be fraudulent; but each case was to depend upon its own circumstances. The investigation of such circumstances might occupy a long time, and a discovery of grounds of suspicion might take place at any period. As these lands were not to be included in the Settlement, no great inconvenience could arise from delay.

But with respect to the allowances for a police force made by the Government, whether in land or in money, the case was quite different. They were included in the Settlement, and if any additional charge was to be thrown upon the landholder in respect of such allowances, it was necessary that it should be ascertained as part of the Settlement. No difficulty in ascertaining the fact could possibly exist. The assessment had been very recently made, and the officers who had made it must, in every case, be perfectly aware whether any such allowances had or had not been made.

In pursuance of these Regulations, Mr. Dickenson, the Collector of Bhagulpore, was required to report whether, in the Settlement for Khuruckpore, any such allowances had been made; and on the 29th of April, 1794, he makes his report in the negative. His words are these (contained in a letter addressed to the President and Members of the Board of Revenue of Fort William, relating to this and other *Zemindaries*):—"In obedience to the 36th Article, I have made the necessary inquiries, but do not find that any allowances, either by deduction from their *jumma*, permission to appropriate the produce of lands, or any other mode, have been granted to any other proprietor for keeping up a police establishment."

This inquiry took place before any permanent grant had been made of this *Zemindary*, and with a view to such grant. No claim to resumption of lands or to alteration of *jumma* was, or, upon the footing of the report, possibly could be, set up by the Government; and nearly two years afterwards, namely, on the 25th of January, 1796, the Government made a grant to the Raja, of the whole *Zemindary* of Khuruckpore, including the

1855.

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

lands in question, to hold to him in perpetuity at the *jumma* assessed in 1789-90, namely, Rs. 65,459 8*a*. 10½*p*.

It is said that Mr. Dickenson made this report under a mistake. A mistake of what? Not of facts, certainly. The existence and nature of these *Ghatwally* tenures, the extent to which they prevailed in this District, and the mode in which they had been dealt with in making the assessment, must, from the circumstances which have been stated, have been perfectly familiar both to the Collector and to the Board of Revenue.

But was he under a mistake of law? That he considered the *Ghatwally* lands as not within the meaning of the clause in question is abundantly clear, and if he was mistaken as to the intentions of the Government who had framed it, a mistake so deeply affecting their revenues, and reaching to such a great extent of territory, must at once have excited the remarks and the remonstrance of the Revenue Board; but they make no objection to his view of the subject, and, accordingly, the grant is made on the terms already stated: the grantee holds under it, and for more than forty years no attempt is made to disturb it.

It would seem to be very difficult, under such circumstances, to permit any part of the lands so granted to be resumed on any allegation of mistake, if there were reason to suppose that any mistake had been made.

Indeed, by Regulation II of 1819, the East India Company formally "renounce all claim on the part of Government to additional revenue from lands which were included within the limits of estates for which a Permanent Settlement has been concluded, at the period when such Settlement was so concluded, whether on the plea of error or fraud, or any pretext whatever, saving, of course, *mehals* expressly excluded from the operation of the Settlement."

But their Lordships are far from thinking that there was any mistake either on the part of the Collector or of the Board of Revenue. All the information which their Lordships can obtain with respect to those lands leads to a different conclusion.

In Mr. Grant's Analysis of the Finances of Bengal, addressed to the Court of Directors, in the year 1786, and printed in the Appendix to the Fifth Report of the Select Committee

on the Affairs of the East India Company, p. 268, the *Zemindary* of Beerbhoom is stated to have been conferred by Jaffier Khan on an Afghan or Patan tribe, "for the political purpose of guarding the frontiers on the west against the incursions of the barbarous Hindus of Jhareund, by means of a warlike Mahomedan peasantry entertained as a standing militia, with suitable territorial allotments, under a principal landholder"; and Mr. Grant afterwards describes the tenure "as in some respects corresponding with the ancient military fiefs of Europe, inasmuch as certain lands were held *la-khiraj*, or exempt from the payment of rent, and to be applied solely to the maintenance of troops."

There is no doubt that the tenures here spoken of are *Ghatwally* tenures, though they are not mentioned by that name.

Beerbhoom immediately adjoins Khuruckpore, and in 1795 some *Ghatwally* lands were transferred from Beerbhoom to the District of Bhagulpore in which Khuruckpore is situate, and in 1797 lands of the same description were transferred from Bhagulpore to Beerbhoom.

In 1813, a report was made by the Collector of Bhagulpore to the Magistrate of Beerbhoom in answer to certain inquiries with respect to *Ghatwally* lands in his District. The Collector states, that the *Ghatwally* lands in his District, are of four kinds: First. The lands already referred to as granted by Mr. Cleavland. These he states to have been allotted in the environs of the forests, at the foot of certain mountains, which he names in various Pergunnahs, and amongst others "Pegunnah, Kankjole, and in some other villages of the Khuruckpore estates, to certain *Ghatwals* and watchmen in lieu of salaries, in the proportion of the number of watchmen attending the said *Ghatwals* to attend to and guard the watch-stations at the passes, and to patrol the precincts of the villages, that no mountaineers might be able to descend from those passes of the mountains to commit night attacks, to invade or assault, or to plunder money or cattle, or to create disturbance." The second class the report describes as, "The *Ghatwals* attached to the Khuruckpore estates, who pay a stipulated rate of rent for their lands and villages, being bound to

1855.

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

protect and guard the highways, to watch the stations at the passes, to prevent disturbances being created by the mountaineers, thieves, and highwaymen. They hold their lands in virtue of *sunuds* granted by the *Zemindar* of Khuruckpore, except some who have recieved theirs from the former authorities." The report then proceeds to state, "That when the *Zemindar*, or Government authority, wishes to appoint a *Ghatwal* to guard the frontiers of the villages, it is his duty to ascertain the produce of the villages, the quantity of *Ghatwally* lands therein, and after deducting a certain rate in the ratio of the guards with the *Ghatwals*, in lieu of wages, to fix a certain rent to be paid by the *Ghatwals*."

After metioning other description of *Ghatwally* lands, he states his opinion, that the *Ghatwals* have no right of inheritance or proprietary interest in their lands, but hold right of possession as long as they perform the terms and conditions of their *sunuds*. The report then states, that at the time of the Decennial Settlement, the *Ghatwals* were not treated as independent *Talookdars*; that no Settlement was made with them, but that they were included in the Settlement of the *Zemindar* of whom their lands were held.

In 1816, another report was made by the Collector of Bhagulpore, in which it is stated, that the *Ghatwals* pay a fixed rent to the *Zemindar* of Khuruckpore, and continue under his control, direction, and subjection, and while the Raja is answerable to the Collector for the rents of the entire District of Khuruckpore.

With respect to the *Ghatwally* tenures in Beerbhoom, it is stated in a Regulation passed with respect to them in 1814 (Regulation XXIX of that year), that the class of persons, called *Ghatwals*, in the District of Beerbhoom, from a peculiar tenure, and that every ground exists to believe, that according to the former usages and constitution of the country, this class of persons are entitled to hold their lands, generation after generation, in perpetuity, subject, nevertheless, to the payment of a fixed and established rent to the *Zemindar* of Beerbhoom, and to the performance of certain duties for the maintenance of the public peace and support of the police.

1855.

Raja Lelanand Sing Bahadoor v. The Government of Bengal.

This description is confined in terms to the District of Beerbhoom, but in the case of *Hurlall* v. *Jorawun Sing*,[1] which occurred in 1837, a question arose as to the nature of these tenures generally, the point for decision being, whether they were divisible on the death of a *Ghatwal* or descended to his eldest son. One of the Judges states, that these tenures are very common in the Nerbudda territory for the protection of the *Ghats*. Another of the Judges seems to consider them as *Chackeran* lands; and the Court was of opinion, that the lands being held conditionally on the performance of certain defined duties, they were not divisible on the death of the *Ghatwal*, but descended to the eldest son.

Lands of this description could not properly be considered as lands of which the *Zemindars* had been permitted by the Government to appropriate the produce to the maintenance of *Tannah*, or police establishments. They were held by a tenure created long before the East India Company acquired any dominion over the country, and though the nature and extent of the right of the *Ghatwals* in the *Ghatwally* villages may be doubtful, and probably differed in different Districts and in different families, there clearly was some ancient law or usage by which these lands were appropriated to reward the services of *Ghatwals*; services which, although they would include the performance of duties of police, were quite as much in their origin of a military as a civil character, and would require the appointment of a very different class of persons from ordinary police officers.

We find accordingly that the office of *Ghatwal* in this *Zemindary* was frequently held by persons of high rank.

Before the date of the Regulations, and in 1783, we have a letter from the Collector of Bhagulpore to the Raja Kadir Ali, informing him that the Ranee Surbissuree, (who from the title must have been a female of high rank), had been dismissed from her office of *Ghatwal* of Jummee Humapa, which is situate in the Khuruckpore estates, by order of the Governor-General in Council, and intimating that, "as the office is in your Highness's gift, Your Highness will, should you deem it necessary and proper, appoint a person to the office of *Ghatwal*

[1] 6 Sud. Dew. Rep., 170.

1855.

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

of the said Pergunnah, to watch day and night at the said *Ghat*. Should it be advisable, your Highness may retain it under your Highness's control informing the Court of the circumstance." Surely the language here used in speaking of the *Ghatwal* is little suited to the appointment of a police officer. It is rather that which in ancient times in England might have been addressed to a Lord of the Marches with respect to a chieftain under his orders.

Again, the officers contemplated by the resumption clause, were a class whom the landowner was in future prohibited from keeping. Was this the case of the *Ghatwals*? Why, we have a letter from the Collector of Bhagulpore to the Raja of Khuruckpore, on the 1st of September, 1808, in which he observes, "as the settlement of rent between the watchmen and yourself rests with you, as also does the dismissal and transfer of the *Ghatwals*, &c., as usual and customary on your estate, the Magistrate has no objection to the measure" (which the Raja had proposed to take), "nor is the Collector opposed to the step": and in the reports of the Collectors to which we have already referred, it is stated, that it is the province of the Raja to appoint and dismiss the *Ghatwals* attached to the Khuruckpore estates; that he usually, but not always, makes a report to the Government when he does so, "that the settlement rests with him, and he raises or depresses the rent."

The appointment of *Ghatwal* has been continued, with the assent of the Government, up to the present time.

Upon this review of the evidence, their Lordships are of opinion, that if any attempt had been made in 1796 to resume these lands under the Regulation now in question, such attempts must have failed, and that, therefore, there can be no ground for the claim now set up by the Bengal Government.

It may be proper to notice the proceedings which have ended in the judgment against which the present appeal is brought.

It appears that on the 29th of November, 1836, the Government in India ordered that if the *Ghatwally* lands were of a nature to be resumed they be subjected to resumption.

1855.

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

The proceedings to be taken for the purposes of resumption, and the Court or tribunal which is to decide the matter, are of a special character.

The Collector of the District, or his Deputy, enters on record, a claim to assess the disputed lands; notice is given to the owners; upon their answers, and upon evidence, the Collector who has made the claim, or one of his deputies, decides upon its validity, and if either party is dissatisfied, there is an appeal to a Special Commissioner appointed by the Government.

On the 1st of May, 1838, Mr. Travers, then Special Deputy Collector of the Districts of Bhagulpore and Monghyr, entered the following claim on the part of the Government against Toofany Sing, *Ghatwal*, who was in possession of the disputed lands in this case:—

"Claim to assess 755 bighas of *Ghatwally* lands, situate on *Ghat Foujdar* Tuppa Dhumsaeen. As it appears from an examination of the *Ghatwally* books, furnished by the Magistrate of this District, for the year 1819, C. E., that the lands in dispute have been appropriated rent-free by the said defendant, as belonging to the said *Ghatwally*, and as it is necessary under Regulation II of 1819, C. E., and Regulation III of 1828, C. E., to inquire into the legality or otherwise of the deeds of grant, it is, therefore, ordered, that this case be numbered and placed upon the file of the Court, and that notice be served upon the defendant."

It does not very distinctly appear from this statement of the claim, upon what grounds it was intended to be rested, but we collect that it was thought that these lands were not included in the estate of Khuruckpore; that they belonged to the *Ghatwal*; and that as no Settlement had been made with him, they were still the subject of settlement, or, in other words, of assessment.

The matter then came upon some interlocutory proceedings before Mr. Alexander, described as Officiating Special Deputy Collector of the Districts of Bhagulpore and Monghyr, and on the 10th of November, 1838, he made a minute in part in these terms:—"It is consequently decided that these lands were conditionally granted: but, *firstly*, the officers do not perform these conditions; and, *secondly*, the Government have no need of their services; besides which, it is evident that the said lands have not undergone any settlement up to the present time, for the

1855.

Raja Leisanund Sing Bahadoor v. The Government of Bengal.

settlement was effected in 1197, F. E., while the said lands were set apart in 1181, F. E. ; and notwithstanding that 2 annas per bégha used to be paid to the *Zemindar* for certain lands, yet, as that cannot be considered rent, but a simple fee, in acknowledgment of the right of the *Zemindar*, the said lands are consequently of a nature to be resumed." It was then ordered, " that the defendant produce any document in his possession invalidating the above-mentioned circumstances within a week, otherwise judgment would go in favour of Government, without any plea in opposition being taken into consideration."

The Raja of Khuruckpore was apparently supposed to have nothing to do with the question ; he was not made a party to the proceedings, nor served with notice of them ; but, on the 27th of November, 1838, he presented a petition, stating that he was the owner of the land, and that Toofany Sing held under a lease from him.

The original defendant put in his answer, stating, that he and his ancestors for several generations had held these lands at a rent of 2 annas per bégha from the Raja of Khuruckpore, and that lands, including thirty-six original villages, beside others subsequently added, were held by the same tenure of the Raja.

A great deal of evidence was gone into ; many inquiries were ordered, in the result of which, it distinctly appeared, that these lands were part of the estate of Khuruckpore, and had been included in the Settlement for that estate ; and, accordingly, on the 9th of December, 1838, Mr. Alexander pronounced a decision founded on those proofs, in which he declared that the lands were of the nature of *Chakeran* lands ; that they were not of a nature to be resumed ; and he ordered the claim of Government to be dismissed.

Like decrees were at the same time pronounced, by Mr. Alexander in the ten other suits.

Not long after these judgments were pronounced, judgments to which no objection can be made, except that they ought to have awarded costs of suit to those who had resisted the claims made against them, Mr. Alexander, unfortunately for all parties, altered his opinion, and thought that although the suits might not be maintainable, on the grounds originally taken, they might be supported under clause 4, section 8, of Regulation I of 1793, and he applied for permission to review his judgment,

The form of proceeding did not allow this to be done; and on the 31st of December, 1839, the Government appealed to the Special Commissioners, bringing forward the clause just mentioned, and also insisting that the lands were not included in the Settlement of the Khuruckpore estate.

Before his appeal was heard, the interest of Maha Raja Rehmut Ali Khan the original opponent of the Government, had been assigned to the father of the present appellant, and he was admitted a respondent to the appeal of the Government.

During the course of these proceedings, the same question had been raised by the Government with respect to other *Ghatawally* lands in other Pergunnahs of this *Zemindary*; and on the 29th of May, 1838, Mr. Travers, in some of these suits, decided in conformity with Mr. Alexander's decision, and dismissed the claim of the Government, and, it is said, that these decisions were confirmed by the Special Commissioner on appeal.

Other suits, on the other hand, of the same description, came before Mr. Alexander, who decided them, not in conformity with his first determination, but according to the view which he had subsequently taken.

On the 21st of May, 1841, the appeal in the present suit came before Mr. Elliott, Special Commissioner, who reversed the decision of Mr. Alexander, stating as the ground of his judgment, that it was evident that the *Ghatwally* lands in dispute in this case, as well as in the other *Ghatwally* suits, were distinct and separate from the Settlement made by the Government. He established, therefore, the claim of the Government, and ordered that all the costs of the suit should be borne by the then respondents.

The concurrence of another Special Commissioner was necessary to give effect to this decesion, [1] and on the 27th of December, 1842, the case came before Mr. D'Oyley.

Mr. D'Oyley differed from Mr. Elliott, and the case was, therefore, remitted to Mr. Moore, Special Commissioner for Calcutta and Moorshedabad.

That gentleman directed an inquiry to be made of the Secretary of the Sudder Board, for the purpose of ascertaining

[1] See Ben. Reg. III of 1828, sec. 4, cl. 6.

1855.

Raja Lelanund Sing Bahadoor v. The Government of Bengal.

whether the *Ghatwally* lands had been excepted from the Settlement of the Khuruckpore estates or not; and finding that they had not been so excepted, he concurred in the opinion of Mr. D'Oyley, and ordered that the appeal of the Government in this, and the other ten suits of the same nature, should be dismissed.

The Government was still dissatisfied, and on the 19th of September, 1843, they applied for a review of the judgment.

The case came again, on several occasions, before Mr. Moore, who directed many more inquiries, the result of which, in the opinion of their Lordships, was to confirm the decision at which he had already arrived. Mr. Moore, however, considered that his former judgment was erroneous, and on the 9th of July, 1844, he reversed it. On the 9th of September of the same year, the case came before Mr. Gordon, a Judge of the Sudder Court, vested with the powers of a Special Commissioner, under the orders of Government, who expressed his concurrence in that decision; and, at last, on the 27th of June, 1845, a final judgment in favour of the Government was pronounced by those gentlemen, resting their decision, as we understand it, on the ground that these lands were, in reality, lands granted for police establishments, and were to be considered as provided for in clause 4, section 8, Regulation I of 1793.

From that decision the present appeal is brought to Her Majesty in Council, and it is scarcely necessary to say, that their Lordships must humbly report to Her Majesty their opinion that the decision complained of ought to be reversed. They have already sufficiently explained the reasons for their opinion, namely, that these lands are not properly within the meaning of the clause relied on by the respondent, that they were a part of the *Zemindary* of Khuruckpore, and were included in the Settlement for that *Zemindary*, and covered by the *jumma* assessed upon it.

If any case should occur in which lands of *Ghatwally* tenure, though not, in their Lordships' opinion, properly falling within the meaning of the Regulation, have nevertheless been dealt with as such, and have not been included in the Settlement of 1793, such case will have to be decided upon its own circumstances, and will not be governed by their Lordships' present decision.

With respect to the costs of the proceedings which have taken place, their Lordships do not doubt that the Bengal Government, in bringing forward this claim, have acted under a sense of public duty, but it is an attempt to disturb, upon insufficient grounds, a Settlement which subsisted without dispute for above forty years, during all which time the right to disturb it, if it exists at all, existed with as much force as when the proceedings were instituted. The claim has been persisted in after several decisions against the Government by their own officers acting as Judges; the decree in their favour has been finally obtained upon grounds different from those on which it was orginally sought, and the appellant has been exposed to a long and most expensive litigation. Under these circumstances, their Lordships think that they should do but imperfect justice, if they did not humbly recommend to Her Majesty that the respondent should be ordered to repay to the appellant all the costs which they have received from him under orders of the Judges below, and should also be ordered to pay to him the costs which he has himself incurred in these proceedings, including the costs of the present appeal.

JOYKISHEN MOOKERJEE
v.
THE COLLECTOR OF EAST BURDWAN.[1]

[Reported in 10 Moo I. A., 16; 1 W. R., P. C., 26; 2 P. C. J., 54.]

1864. May, 5.

The consideration of the appeal was reserved: judgment was now delivered by

THE RIGHT HON. LORD KINGSDOWN.—The question in this case relates to a small quantity of land, consisting of nineteen beeghas and some cottahs, in the *Talook* of Gobindopur. This *Talook* originally formed part of the great *Zemindary* of Burdwan, and previously to its purchase by the appellant it had been granted in *Patuee* by one of the Rajahs of Burdwan. In the year 1852 it was put up to sale by the Collector of the *Zillah* of East Burdwan, under the provisions of Beng. Reg. VIII of 1819, in order to realize the amount of arrears of rent due from the then *Patuedar*. The appellant became the purchaser, and entered into the receipt of the rents and profits of the *Talook*, and it must be assumed that, as *Patuedar*, he became entitled to the same rights in the subject-matter of the suit which were enjoyed by the *Zemindar*.

At this time the lands now in dispute were in the possession of a person named Ahmed Buksh, who paid no rent for them either to the Government or to the *Talookdar*, but, instead of rent, performed certain services. What was the nature of those services is one of matters now in question. Another is, what is the character of the lands thus held by these services; are they legally appropriated for the performance of these services, or are they lands which are the free and absolute property of the *Talookdar*, and which he is at liberty to resume and dispose of as he may think fit, either dispensing altogether with the services, or providing from other sources from the performance of

[1] *Present*: Members of the *Judicial Committee*,—The Right Hon. LORD KINGSDOWN, the Right Hon. the LORD JUSTICE KNIGHT BRUCE, and the Right Hon. the LORD JUSTICE TURNER.

Assessors:—The Right Hon. SIR LAWRENCE PEEL, and the Right Hon. SIR JAMES W. COLVILE.

these services if he be under any obligation to secure their performance?

On the 11th of January, 1855, the plaint in the present suit was filed, and the Collector of East Burdwan, as representing the Government, was made a defendant. The plaint insisted that the lands in question were part of the *Talook*; that the lands were what are called "*Mál Surunjamee*" or "*Gram Surunjamee*" held for the performance of services personal to the *Zemindar*, and for the protection of his property; that Ahmed Buksh had ceased to perform any *Zemindary* services; and that the plaintiff had appointed another person to perform such services, and was entitled to resume possession of the lands.

On the 9th of January, 1856, the Collector of East Burdwan filed his answer, and he thereby insisted, "that the land in question was not *Mál Surunjamee* (service land for taking care of the *Mál* or *Zemindar's* property), but *Chakeran* land for the performance of Police or *Chowkeedary* duties; that the land being *Chowkeedary Chakeran* land, the *Zemindar* has no power to interfere with the property as long as the Policemen carry out their various duties."

The main issue raised between the parties, therefore, was as to the nature of the tenure on which the land was held: the contention on the part of the appellant being that they were of one description and subject to the performance of no Government services, and the contention of the respondent that they were of another description and subject to the performance of no services to the *Zemindar*. Shortly before the Collector put in his answer, the *Foujdary* Court of East Burdwan had issued an order "that a *Perwannah* be sent to all the *Daroghas* of this jurisdiction, that the *Chowkeedars* under their control be instructed not to attend to *Zemindary* duties."

It appears that these *Zemindars* were entrusted, previously to the British possession of India, as well with the defence of the Territory against foreign enemies, as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ not only armed retainers to guard against hostile inroads, but also a large force of *Tannahdars*, or a general Police force, and other officers in great numbers, under the name of *Chowkeedars*,

1864

Joykishen Mookerjee v. The Collector of East Burdwan.

Pykes, and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the *Zemindar*, the collection of his revenue, and other services personal to the *Zemindar*.

All these different officers were at that time the servants of the *Zemindar*, appointed by him and removable by him, and they were remunerated in many cases by the enjoyment of land rent free or at a low rent in consideration of their services.

The lands so enjoyed were called *Chakeran* or service lands. These lands were of great extent in Bengal at the time of the Decennial Settlement, and the effect of that Setlement was to divide them into two classes :—

First. *Tunuahdary* lands, which, by Ben. Reg. I of 1793, sec. 8, cl. 4, were made resumable by the Government ; the Government taking upon itself the maintenance of the general Police force and relieving the *Zemindar* from that expense.

Second. All other *Chakeran* lands, which, by Ben. Reg. VIII of 1793, sec. 41, were, whether held by public officers or private servants, in lieu of wages, to be annexed to the *Malguzary* lands, and declared responsible for the public revenue assessed on the *Zemindars'* independent *Talooks* or other estates, in which they were included in common with all other *Malguzary* lands therein.

It is clear upon the evidence, and in fact was not disputed at the Bar, that the lands in question are *Chakeran* lands of the second class, and it follows that, if resumable at all, they are resumable by the appellant ; and secondly, that if the services on which they are held are Police services at all, they are the services of *Chowkeedars* or village watchmen.

The *Zemindar* had an interest in the performance of the duties of the village watchmen, inasmuch as they protected his property ; but the public also had a great interest in their maintenance, and in the peace and good order which they were employed to preserve, and the Government, as representing the public, reserved therefore a strict control over them.

Accordingly, various Regulations were passed for the purpose of enabling the Government to effect this object. Registers were required to be kept of the different persons filling these offices in each *Zemindary*, with a statement of the

funds allotted for their support. The officers themselves were made subject to the orders of the *Darogah*, or Superintendent of the Police of the District. The *Zemindar* was required to remove them on complaint of their misconduct by the *Darogah*, and, finally, they were made removable by the Magistrate on sufficient cause. But we can find nothing in these Regulations which takes from the *Zemindar* the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the *Chowkeedar* such services as he was bound by law or usage to render to the *Zemindar*. It might well happen that, either by long usage or by the original contract, when the lands were granted, the village watchman might become liable, in addition to his Police duties, to the performance of other services personal to the *Zemindar*, as the collection of his revenue and the like. Indeed, the rules laid down for the Decennial Settlement appear to us to recognize the interests both of the *Zemindars* and the public in lands of this description. They were not to be included in the *Malguzary* lands for the purpose of increasing the *jumma*, because the *Zemindars* had not the full benefit of them; but they were to be included in the *Malguzary* lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest.

Such being in our opinion the general law, let us look at the facts of this particular case. It is found by the *Zillah* Judge[1] that the duties performed by the persons in possession of these lands, both before and since the Decennial Settlement, have been partly Police and partly *Zemindary*, as follows:—*Zemindary*: First (personal to the *Zemindar*). To collect or enforce collection of rents; to guard Mofussil treasuries, and perhaps to escort Mofussil treasures. Second (common to the village community). To keep watch at night, and to secure the harvests. Police: To maintain the peace; to apprehend offenders under the orders of the *Tannahdar*; to report criminal

[1] 10 Moo. I. A., p. 28.

1864.

Joykishen Mookerjee v. The Collector of East Burdwan.

occurrences; to convey public money to the Sudder Treasury (this duty has ceased since the Decennial Settlement); to serve as guides to travellers. The Judge adds:—"I may add that it is notorious, and in my certain knowledge, that most of these duties are at this time performed by the village watchmen in Burdwan."

From this finding their Lordships see no reason to dissent.

But it may well be that although these lands have been held by the predecessors of the defendant, Ahmed Buksh, and were held by him as *Chowkeedar*, liable to perform services to the public as well as to the *Zemindar*, yet that there has been no legal appropriation of the land for that purpose, and that the appellant may be entitled to recover the land, though he may be under an obligation to provide for the performance of such services as a *Chowkeedar* is liable to perform for the public.

The evidence appears to stand thus:—

At the time of the Decennial Settlement, though these lands were included in the *Zemindary*, their annual value does not seem to have been taken into account in fixing the *jumma*. This is consistent at least with the hypothesis that they were then appropriated to the payment of some officers whom it would be necessary for the *Zemindar*, either for his own or for the public interest, to maintain. We find that in 1813, the particular lands in question were in this *Talook* held by Srishteedur, who is described as *Tannahdar*, and they appear ever since to have been held by persons succeeding him in the same character. They were not held as *Tannahdary* lands in the strict sense of the expression—lands of that description had already been resumed by the Government—but as *Chowkeedary* lands: lands appropriated to the maintenance of an officer who performed, and was liable to perform, duties as a village watchman. We think that these circumstances are sufficient to warrant the inference that the lands in question were at the time of the Decennial Settlement appropriated, and still are liable, to the maintenance of such an officer, and that the *Talookdar* has no right to take possession of them for his own purposes, and hold them, discharged of the obligation to which they are subject.

On the other hand, it is established by the evidence that the *Chowkedars* in this district have always been accustomed to perform services personally to the *Zemindar* as well as to the

Police. This is distinctly stated to be the fact by Mr. Skip-with, the officiating Collector, in 1837, and by the Judge of the *Zillah* Court in the present case, and it is admitted by the Government. We think, therefore, the order of the *Foujdary* Court in December, 1855, forbidding the performance of *Zemindary* services by the *Chowkeedar*, was without any warrant in law.

Cases of this description must, as it seems to us, depend mainly, if not wholly, for their decision upon the question, what was the tenure or character of the lands at the time of the Decennial Settlement, and how they were dealt with in that settlement.

In this case, the result, in our opinion, is, that both parties have insisted on more than they were entitled to. One side has contended that the holder of these lands is liable to the performance of none but *Zemindary* duties; the other, that he is liable to the performance of none but Police duties.

Under these circumstances, we feel considerable difficulty as to the course which we ought to take. If we advise the affirmance of the judgment, we may seem to countenance the opinion that the Government has the right to take possession of these lands, and to appoint a person to perform, as *Chowkeedar*, general Police duties, to the exclusion of duties to the *Talook* and the *Talookdar*; and this is very far from being our opinion.

On the other hand, we think that we cannot advise the reversal of the judgment, having regard to the form of the pleadings, without maintaining the position assumed by the appellant, that these are *Gram Surunjamee* lands, not liable to the performance of any but personal services to the appellant; and from this opinion also we dissent.

The state of the pleadings prevents us from reaching the real merits of the case. It is not for us to say how these merits may best be reached. It may be that the appellant having appointed a fit person to discharge the duties of village watchman, and to perform the duties personal to himself, may be entitled to recover the land for the purpose of its being held by the person so appointed, or it may be that the person so appointed may himself be entitled to recover the land. On these points we give no opinion. But on the whole, having regard to the appellant being plaintiff in the suit, and having failed to

1864.

Joykishen Mookerjee v. The Collector of East Burdwan.

make out the case which he set up, we think that we shall best discharge our duty by humbly advising Her Majesty to affirm the judgment complained of, but without giving any costs, and to declare that the lands in question are to be considered as appropriated to the maintenance of a *Chowkeedar* or village watchman in this *Talook*, and that the right of appointing such officer belongs to the *Talookdar*, and that such officer is liable to the performance of such services to the *Talookdar* as, by usage in the *Zemindary* of Burdwan, *Chowkeedars* have been accustomed to render to the *Zemindar*, and to declare that the affirmance of the judgment is to be without prejudice to any (if any) other suit which the appellant may think fit to institute in respect to the matters in dispute in this cause.

LOPEZ

v.

MUDDUN MOHUN THAKOOR.*

[*Reported in 13 Moo. I.A., 467 ; 5 B. L. R., 521 ; 14 W. R. P. C., 11 ; 2 P. C. J. 594.*]

1870.
July 11.

Without calling for a reply, their Lordships' judgment was pronounced by

THE RIGHT HON. THE LORD JUSTICE JAMES.—The plaintiff in this case Felix Lopez, was the proprietor of a very considerable estate, a *Mouzah*, on the banks of the Ganges. By the year 1840, by reason of the continued encroachment of that river, it was wholly submerged, and it was, to adopt an expression used in this class of cases in India, "diluviated"; that is, the surface soil, the culturable soil, was wholly washed away. After the lapse of some years, and after one temporary recession and re-encroachment which has occurred in the interval, the water has ultimately retired, and the land, having been for some time in a state described as admitting of only temporary cultivation by hand sowing, has become hard and firm soil, capable of being cultivated in the usual manner. The plaintiff says, "This was my property. The Ganges, which swallowed it, has again yielded it up, and I claim my property, which, having been buried and lost to sight, has again reappeared."

The rule of the English law applicable to this case, is thus expressed in a work of great authority, Hale, de Jure Maris, p. 15 :—"If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it ; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land, the same can be known, or it be by art or industry regained, the subject doth not lose his property." "If the mark remain or continue, or the extent can reasonably be certain, the case is clear." And in another place, p. 17, he says : "But if it be freely left again by the reflux and

* *Present* : Members of the *Judicial Committee*,—The Right Hon. SIR JAMES WILLIAM COLVILE, the Right Hon. SIR JOSEPH NAPIER, BART, and the Right Hon. the LORD JUSTICE JAMES.

Assessor :—The Right Hon SIR LAWRENCE PEEL.

1870.

Loper
v.
Muddun Mohun Thakoor.

recess of the sea, the owner may have his land as before, if he can make out where and what it was; for he cannot lose his propriety of the soil, although it for a time becomes part of the sea, and within the Admiral's jurisdiction while it so continues."

This principle is one not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner.

There is, however, another principle recognized in the English law, derived from the Civil law, which is this,—that where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land, *Rex* v. *Lord Yarborough*.[1] And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the Sea [*In re The Hull* v. *Selby Railway*[2]]. To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined.

This principle of law, so far as relates to accretion, has, to some extent, been made part of the positive written law of India, and it is on the operation of such positive written law that the defendants' case is based. This law is to be found in the Regulation XI of 1825, a Regulation for declaring the rules to be observed on the determining of claims to lands gained by alluvion, or by the dereliction of a river, or the sea. There is a

[1] 2 Bligh., N. R., 147. [2] 5 Mee. & Wel., 327.

recital in that Regulation, as to disputes which had arisen with regard to such claims, and the necessity of having some definite rule laid down with regard to several matters, only one of which is material or relevant to the present case; and that is the case provided for by the 4th section of the Regulation. By cl. 1 of that section it is provided that, "when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from the Government," or from any intermediate landowner. And the defendants' contention is, that the plaintiff's land having been wholly submerged, so as to make their (the defendants') land the river boundary, the subsequent recession of the river has caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been re-formed on the ascertainable and ascertained site of the plaintiff's *mouzah*.

It is to be observed, however, that that clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away any body's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The plaintiff here says: "I had the property. It was my property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. There was nothing in that state of things that took it from me and gave it to the Government. When it emerged there was nothing that took it from me and gave it to any other person." And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another.

In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then Legislative authority was dealing with, was the gain which an individual proprietor might make in this way

1870.

Lopez v. Muddun Mohun Thakoor.

from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which, was in a state of nature neither valuable nor usable.

And on the very words of the section itself, if the ownership of the submerged site remained as it was (and there seems nothing to take it away), it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property.

If we had then to consider the question for the first time, we should have come to the conclusion that the 4th section did not govern the case, and that the question would have to be determined by the general principles of Equity, to which all cases not in terms provided for are referred by the 15th section. Those principles would not give the plaintiff's property to the defendant. But the question is not raised for the first time. The very point came for consideration in India before a Court comprising Sir Barnes Peacock, Mr. Justice Bayley, and Mr. Justice Kemp; and after full consideration, it was decided that lands washed away and afterwards re-formed on an old site, which could be clearly recognized, are not lands gained within the meaning of section 4, Regulation XI of 1825, *viz.*, they do not become the property of the adjoining owner, but remain the property of the original owner.

And the same point arose in a case in this Court of *Mussumat Imam Bandi* v. *Hurgovind Ghose*.[1] It is there said:—"The whole of the District adjoining the land in dispute, as well as that land itself, is flat, and very liable to be covered or washed away by the waters of the Ganges, which river frequently changes its channel. The land in dispute was inundated about the year 1787; it remained covered with water till about 1801, and then became partly dry, until, in the year 1814, it was again inundated. After this period it once again re-appeared

[1] 4 Moo. I.A., 403; 1 P. C. J., 371.

above the surface of the water, and, by the year 1820, it became very valuable land." That is a state of things very singularly like what has occurred in this case.

In that case it was held as follows :—" The question then is, to whom did this land belong before the inundation ? Whoever was the owner then remained the owner while it was covered with water, and after it became dry."

This authority appears to their Lordships conclusive in the present case.

In a subsequent case, however, *Kattemonee Dossee* v. *Ranee Monmohinee Dabee*, [1] it was held by a Court comprising Justices Trevor, Loch, Bayley and Morgan, that all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases ; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification ; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the river. Their Lordships, however, are unable to assent to any such distinction between surface and site. The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained.

Their Lordships, however, desire it to be understood that they do not hold that property absorbed by a sea or a river is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation.

But in this case not only did the parties themselves take the proper, prudent and honest means of preventing the necessity of any dispute arising by interchanging the *Tanabundee* which has been put in evidence, but the plaintiff, as between him and the State, did also take the most effectual means in his

[1] (1865) 3 W. R., 51.

1870.

Lopes
v.
Muddun Mohun Thakoor.

power (having the description and measurement of the submerged *mouzah* recorded, and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him. Their Lordships are, therefore, of opinion that the property now being capable of identification by means of that *Tanabundee* and otherwise, the property having been the property of the plaintiff when it was submerged, never having been abandoned or dereliet, having now emerged from the Ganges, is still his property; and they will, therefore, recommend to Her Majesty to reverse the decision of the Court from which the appeal has come, to affirm the decision of the Principal *Sudder Amin*, and that the costs of the litigation both below and here should be given to the appellant, the plaintiff.

HURRYHUR MOOKHOPADHYA

v.

MADUB CHUNDER BABOO.

NOBOKISHTO MOOKERJEE

v.

KOYLASHCHANDRO BHUTTACHARJEE.

[*Reported in 14 Moo. I. A., 152; 2 P. C. J., 713; 20 W. R., 459; 8 B. L. R., 566.*]

1871.
July, 18.

The consideration of the appeals having been reserved, their Lordships' Judgment in both cases was delivered by

THE RIGHT HON. SIR JAMES WILLIAM COLVILE.—This appeal, and that of *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo*, were lately argued *ex parte* before this Committee. The principal question involved in them is common to both, but inasmuch as in each some subordinate point peculiar to it was also raised, their Lordships will deal with them separately. They propose to take first the appeal of Nobokisto, though the last argued, because that record contains a judgment pronounced on the 27th of March, 1865, in a third case, No. 268 of 1864,[1] wherein the High Court stated fully the grounds upon which the ruling, impugned by both these appeals, is founded.

This suit was instituted by the appellant as a *Durputneedar*. Its object was to obtain a declaration that certain lands which the respondents claimed to hold as *Lakhiraj* land were so held by them under an invalid title; that they were the *mal* lands of the appellant, liable, as such, to pay rent to him, and to have them assessed accordingly. The suit was originally brought before the Collector, but under the provisions of an Act of the Bengal Council, No. VII of 1862, was afterwards transferred to the Principal *Sudder Ameen* of Zillah Hooghly.

Present:—Members of the *Judicial Committee*.—The Right Hon. SIR JAMES WILLIAM COLVILE, the Right Hon. the LORD JUSTICE JAMES, and the Right Hon. the LORD JUSTICE MELLISH.

Assessor:—The Right Hon. SIR LAWRENCE PEEL.

[1] *Khelatchunder Ghose* v. *Poornochunder*, 2 W. R. 258.

1871.

Hurryhur Mookhopadhya v. Madub Chunder Baboo.

The plaint expressly stated, that the suit was brought under the 1st clause of section 30 of Regulation II of 1890. Their Lordships need not consider particularly the provisions of that enactment. It is only material to observe, that in suits brought under it by a *Zemindar*, or one to whom the *Zemindar's* rights have been transferred, the whole burthen of proving the nature and commencement of his title was understood to be thrown upon the defendant, the *Lakhirajdar*, whom the plaintiff, who disputes the validity of the tenure, might compel to produce the *Sunnuds* and other ancient documents upon which such title rested. The sole proof of title which the defendant could require, in the first instance, from the plaintiff was that the lands in question were within the ambit of his *zemindary* or *putnee*, as the case might be. This issue the respondents in the present case did raise, and successfully raise, as to part of the land. As to the rest of the land, the only issue, except that of limitation, was, whether it was the respondent's valid rent-free land or not, the whole burthen of proof on this issue being cast on them.

The Principal *Sudder Ameen*, the Judge of the Court of First instance, found that of the land in suit, 2 beegahs and 1 cottah were not within the appellant's *putnee*; that as to 12 beegahs and 14¾ cottahs, other part of that land, the respondents had proved, by certain ancient documents, that they had held and enjoyed them as rent-free lands from long before the 1st of December, 1790, and that, consequently, the claim to assess them was barred by limitation. The residue, being 3 beegahs 17¾ cottahs, he held liable to assessment. Both parties appealed against this decision to the Zillah Judge who, on the 21st of June, 1864, confirmed the decree of the Principal *Sudder Ameen*, so far as it related to the 2 beegahs and 1 cottah, but reversed it as to the rest of the land, making as to that a decree in favour of the appellant's claim. The grounds of his decision were, that the documents produced by the respondents were untrustworthy, and, therefore, that they had failed to prove either a valid title to hold the land rent-free, or that the land, having been held rent-free for a period commencing before the 1st of December, 1790, the appellant's right to assess them was barred by limitation.

1871.

Hurryhur Mookhopadhya v. Madub Chunder Baboo.

The respondent then preferred a special appeal to the High Court. Of the grounds stated for the appeal it is only necessary to notice the third and the fourth. The third is, that the suit being brought, though improperly, under section 30, Ben. Reg. II of 1819, was admittedly barred by limitation. The fourth, that the *onus probandi* had been improperly thrown upon the defendants. On the 13th of April, 1865, the High Court remanded this suit, with five others, which it treated as being in the same category, to the Court of First Instance, stating only that "the *onus* having been misplaced, these cases must go back to the First Court with reference to the principles laid down in case No. 268 of 1864." [1]

Before considering the property of this remand, which is the principal question raised by the appeal, it will be convenient to complete the history of this particular case. The appellant went again before the Principal *Sudder Ameen*, amending his plaint pursuant to the Order of remand by striking out all reference to the Reg. II of 1819, and making it a plaint for the resumption of land fraudulently made *Lakhiraj* after the 1st of December, 1790, and therefore, falling within the 10th section of Regulation XIX of 1793. The Principal *Sudder Ameen* thereupon framed fresh issues, the first of them being, whether the land in dispute ever formed a portion of *mal* land at the time of the Government settlement, and whether at any subsequent time it had been fraudulently made rent-free; and on the 13th of September, 1865, he dismissed the suit upon the ground, that the plaintiff, the appellant, had produced no documents or evidence in the suit, and had thereby failed to support the burthen of proof which this issue cast upon him. The appellant, afterwards in August, 1865, obtained from the High Court a very special leave to appeal to Her Majesty in Council, on the ground that this suit, though the subject-matter of it was far below the appealable value, was one of a large class in which similar remands had been made. Their Lordships will assume that this leave to appeal was properly granted, and that the object of the appeal, or at least its principal object, is to test the correctness of the principle on which remands in this and similar cases have been directed, and the burthen of proof to some extent cast on the plaintiff in suits of this nature.

[1] 2 W. R., 258.

1871.

Hurryhur Mookhopadhya v. Madub Chunder Baboo.

In order to do this, it is necessary shortly to review the law relating to *Lakhiraj* tenures within the Provinces embraced by the Perpetual Settlements, and some recent decisions of the High Court of Calcutta concerning it.

The foundation of that law is well known to be Regulation XIX of 1793. That Regulation, after affirming in the strongest terms the *primâ facie*, or, so to speak, Common law right of the ruling power to a certain proportion of the produce of every beegah; after declaring all *Lakhiraj* tenures to be exceptional and in contravention of that right; that many of the existing tenures of that kind were invalid; but that all, whether valid or invalid, had been excluded from the Decennial Settlement; and that the *jumma* assessed upon the estates of individuals under that Settlement was to be considered as exclusive and independent of all *Lakhiraj* lands, whether exempted from the *Khiraj* or public revenue, with or without due authority; proceeded thus to deal with the then subsisting *Lakhiraj* tenures. It divided them into two classes, *viz.*, those created by grants made previous to the 12th of August, 1765, the date of the grant of the *Dewanny* to the East India Company, and those created by grants made between that date and the 1st of December, 1790. The former by the second section were, subject to certain conditions, declared to be valid. The latter, with certain exceptions, and subject to certain conditions, were, by the third section, declared to be invalid; and, as such, to be resumable and subject to future assessment. The Regulation then went on to sub-divide the invalid and resumable tenures into two classes, *viz.*, those which comprised lands not exceeding 100 beegahs, and those which comprised lands in excess of that quantity. The revenue which might thereafter be assessed on the former was declared to belong to the *Zemindar* or *Talookdar*, within whose estate the lands were situate. The revenue, which might thereafter be assessed on lands falling within the latter class, was declared to belong to the Government. And thus the power of bringing a resumption suit to impeach a *Lakhiraj* tenure existing at the date of the Decennial Settlement, and to have revenue or rent assessed thereon came to belong to the Government, or to private proprietors, according to the quantity of land comprised in such tenure. Having thus dealt with all the

1871.

Hurryhur Mookhopadhya v. Madub Chunder Baboo.

Lakhiraj tenures then subsisting, the Regulation proceeded to legislate against the future conversion of any rent-paying lands comprised in the Decennial Settlement into rent-free lands. This was done by the tenth section, which is in these terms :—

"All grants for holding land exempt from the payment of revenue, whether exceeding or under 100 beegahs, that may have been made since the 1st of December, 1790, or that may be hereafter made, by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil or the rents of it. And every person who now possesses, or may succeed to the proprietary right in any estate or dependent *Talook*, or who holds, or may hereafter hold, any estate or dependent *Talook*, in farm of Government, or of the proprietor, or any other person, and every Officer of Government appointed to make the collections from any estate or *Talook* held *Khas*, is authorized and required to collect the rents from such lands at the rate of the Pergunnah, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or *Talook* in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of the dispossession or annexation to any Officer of Government; nor shall any such proprietor, farmer, or dependent *Talookdar* be liable to an increase of assessment on account of such grants, which he may resume and annul during the term of the engagements that he may be under for the payment of the revenue of such estate or *Talook* when the grant may be so resumed and annulled. The managers of the estates of disqualified proprietors, and of joint undivided estates, are authorized and required to exercise, on behalf of the proprietors, the powers vested in proprietors by this section."

It is obvious that this enactment relates solely to lands which, on the 1st of December, 1790, were *mál* or rent-paying lands; that it treats the grant of a rent-free tenure in such lands not as voidable, but as absolutely void; that it reserves to the Government no right in such lands unless they happened to be held *khas*; and that it positively declared, that no length of possession should give validity to any such

1871.

Harryhur Mookhopadhya v. Madub Chunder Babee.

grant. It further expressly authorized the landowner to dispossess the grantee by the high hand, without having recourse to the machinery provided by other sections of the Regulation for the resumption or assessment of resumable *Lakhiraj* tenures; or to any other legal proceeding.

The machinery, provided for resumption suits by the Regulation of 1793, was modified by several subsequent Regulations, and in particular by the Regulation II of 1819, which has been already mentioned. And in process of time landowners, seeking to enforce their rights under the 10th section of that Regulation, seem to have found it expedient to do so by means of legal proceedings rather than in the summary manner authorized by that enactment. An important distinction was, however, established by judicial decisions between a suit to enforce a claim under this 10th section, and ordinary resumption suits, whether brought by Government or individual proprietors under the earlier sections of the Regulation. Whatever doubts may at one time have existed, it became unquestionable, after the decision of this Committee in the case of the *Maharajah of Burdwan*,[1] that the right of the Government to resume a voidable *Lakhiraj* tenure, comprising more than 100 beegahs was subject to the sixty years' limitation; and that by parity of reasoning the right of a *Zemindar* to resume a voidable *Lakhiraj* tenure, comprising less than 100 beegahs, was subject to the twelve years' limitation. On the other hand, the Courts construing the Regulation of Limitation in connection with that part of sec. 10 of Regulation XIX of 1793, which says, that no length of possession shall give validity to such a grant, came (whether on sound principles or not it is immaterial here to consider) to the conclusion, that the claim of a landowner under this section was subject to no limitation. Notwithstanding, however, these distinctions between the two rights, and between the suits to enforce them, a loose practice seems to have sprung up, under which landowners claiming the right to assess lands held and enjoyed rent-free brought their suits generally under Regulation II of 1819, without specifying whether they were seeking to enforce the right given to them by the 7th and 9th sections of Regulation XIX of 1793, or that given to them by the 10th section. The result was that

[1] 4 Moo. I.A., 466.

1871.

Hurryhur Mookhopadhya v. Madab Chunder Baboo.

the stringent provisions of Regulation II of 1819, and of the other Regulations *in pari materia* were indiscriminately applied; and that in all cases the burthen was cast upon the defendant of proving, by the production of ancient documents, that his tenure existed before the 1st of December, 1790. If he established this he would probably succeed, whether his ancient *Lakhiraj* tenure was voidable or not, the suit unless the plaintiff happened to be an auction purchaser at a Government sale, being barred by limitation.

So stood the law and practice until Act X of 1859, was passed. The 28th section of that Act repealed so much of the 10th section of Regulation XIX of 1793 as authorized the landowner summarily to dispossess the grantee of a rent-free tenure; it provided that every landowner, who should desire to assess any such land or to disposses the grantee, should take proceedings before the Collector which were to be dealt with as a suit under that Act; and it fixed a period within which such suits were to be brought.

Between the passing of this Act and the beginning of the year 1865, the Courts of Bengal seem to have been somewhat divided upon several questions touching the proper mode of enforcing the claims of *Zemindars* and other landowners, under the 10th section of Regulation XIX of 1793; and some, at least, of such questions were finally referred for adjudication by a Full Bench, consisting of seven Judges of the High Court, in the appeal of *Sonatun Ghose* v. *Moulvi Abdool Farar*. This case, which was numbered No. 869 of 1864, was decided on the 25th of January, 1865.[1] The Judges were divided in opinion, each delivering a separate judgment, in which the law on the subject was elaborately reviewed. But the following was the final judgment of the Court. All the Judges held, that before the passing of Regulation II of 1819 the Civil Courts under their ordinary jurisdiction were competent to entertain regular suits by *Zemindars* for the declaration of their rights to resume revenue illegally alienated subsequent to 1790, and for possession of the land held rent-free under grants or titles which had their origin subsequently to the 1st

[1] 2 W. R., 91; B. L. R. Sup. Vol., 109. See also *Purbati Charan Mookerjee* v. *Rajkrishna Mookerjee*, B.L.R., Sup. Vol., 162.

1871.

Hurgyhur Mookhopadhya v. Madub Chunder Baboo.

December in that year. Four of the Judges against three held, that such suits were unaffected by the passing of Regulation II of 1819, section 30, of which the proper operation was limited to suits for the resumption of *Lakhiraj*, existing prior to the 1st of December, 1790. And four of the Judges against three held, that the jurisdiction of the ordinary Civil Courts to try the suit was not taken away or affected by the 28th section of Act X of 1859.

The second of these rulings is, that which is most material to the decision of the present appeal; the necessary consequence of it being that a suit to enfore a claim arising under the 10th section of Regulation XIX of 1793, if brought under the 30th section of Regulation II of 1819, in order to get the benefit of the procedure there prescribed, is improperly framed.

The same case came again before a Full Bench of seven Judges,[1] somewhat differently composed, on the 22nd of February, 1865. They unanimously held, that they were bound by the decision of the 25th of January, 1865, so far as it went. But they further decided, that the regular suit which, notwithstanding the 28th section of Act, No. X of 1859, might still be brought to assess or resume invalid *Lakhiraj*, created since the 1st of December, 1790, was not subject to limitation; and further, that in every fresh suit it lay upon the plaintiff to prove that the case was one falling within the 10th section of Reg. XIX of 1793. And the Court added, "He must prove his allegation, that the land held by the defendant, and which he claims to be *Lakhiraj*, is part of the *mál* land of the plaintiff. If he prove that fact, and so that it was assessed to the public revenue at the time of the Decennial Settlement, it may be presumed that the right under which the defendant claims to hold as *Lakhiraj* commenced subsequently to the 1st of December, 1790, unless the defendant gives satisfactory evidence to the contrary." In another case, decided the same day by the same Judges,[2] they adhered to the ruling in No. 869 of 1864, to the effect, that section 30 of Reg. II of 1819 related only to suits for resumption of *Lakhiraj* created prior to the 1st of December, 1790, and held that, as a consequence of that ruling, every suit alleged to be brought under section 30 was necessarily not one to which the rule

[1] *Sonatun Ghose* v. *Moulvie Abdool Turrub*, 2 W. R. 205.

[2] *Heera Mosee* v. *Koonj Beharee Haldar*, 2 W. R. 207.

1871.

Hurryhur Mookhopadhya v. Madub Chunder Baboo.

created by section 10, Reg. XIX of 1793, of exemption from limitation, applies. They further decided, that the plaintiff, having erred in stating that the suit was brought under section 30 of Reg. II of 1819, should, if he wished to do so, be allowed to amend his plaint, and that, in such case, the cause should be remanded for retrial; but that if the plaintiff did amend his plaint, he must show on the face of it, as required by the law of procedure, when his cause of action accrued, and if it accrued beyond the period ordinarily allowed by any law for commencing such a suit, upon what ground an exemption was claimed.

There has been, so far as their Lordships are aware, no appeal from these decisions of a Full Bench of the High Court. They have since given the law to the Division Benches of that Court; and the order of remand, of which the present appeal complains, is one of many which have been made in accordance with them. The judgment in the case of *Khelut Chunder Ghose* v. *Poorno Chunder Roy*,[1] (No. 268 of 1864), is, in fact, only a recapitulation of what had been decided and laid down in one or other of the above-mentioned decisions of the Full Bench.

No attempt was made at the Bar to impugn the correctness of the first decision in No. 869 of 1864. It must be held, therefore, to be settled law that the provisions of the 30th section of Reg. II of 1819 do not apply to such a suit as the appellant's, and the only questions which the appeal raises, are whether, this being so, the High Court has been right in remanding this and other suits similarly circumstanced for re-trial; whether on such a re-trial the burthen of proof should be cast in the degree in which the High Court cast it on the plaintiff; and lastly, whether there is anything in this particular case which renders such an order of remand, though otherwise correct, improper.

Their Lordships are very clearly of opinion, that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the plaintiff, whose suit, if not so remanded, ought to have been dismissed. The invocation of the 30th section of Reg. II of 1819 is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and presumptions, prescribed by that enactment, and the enactments *in pari materiâ*, greatly

[1] 2 W. R. 258.

1871.

Hurryhur Mookhopadhya v. Madub Chunder Baboo.

to the advantage of the plaintiff, and consequently to the prejudice of the defendant. It follows that, if the procedure was not applicable to the case, there had been a mis-trial.

Again, their Lordships think that no just exception can be taken to the ruling of the High Court touching the burthen of proof which in such cases the plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a *primâ facie* case. His case is that his *mál* land has, since 1790, been converted into *Lakhiraj*. He is surely bound to give some evidence that his land was once *mal*. The High Court, in the judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the *mál* assets of the estate at the Decennial Settlement. His *primâ facie* case once proved, the burthen of proof is shifted on the defendant, who must make out that his tenure existed before December, 1719.

It may be objected that the result of this ruling may be that plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the plaintiff to give *primâ facie* proof of the fact which is the foundation of his title; a circumstance not likely to occur unless the defendants, or those from whom they claim, have been long in possession of the tenure impeached. Nor is it, in their Lordships' opinion, to be regretted if in such cases effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations, which have now been decided to be inapplicable to suits of this nature, and by relieving defendants from a burthen which every year made it more difficult to support.

The only other point to be decided on this appeal is, whether there is any peculiarity in this case which ought to take it out of the general rule. Their Lordships are of opinion, that there is not. Mr. Doyne argued that the defendants had admitted that the lands in question, with the exception of the small quantity no longer claimed, were within the appellant's

1871.

Hurryhur Mookhopadhya v. Madub Chunder Baboo.

estate. But such an admission is obviously not sufficient to meet the burthen of proof thrown upon the plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been *mál* lands. In fact, the defendants strenuously asserted the contrary. The appellant, therefore, having failed to give any evidence on the second trial in support of his amended plaint, the decree dismissing his suit was right.

In the other appeal, that of *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo* the suit was also, on the face of it, brought under section 30 of Ben. Reg. II of 1819, though to enforce a claim under section 16 of Reg. XIX of 1793. In fact, in this case there was a preliminary proceeding under the 28th section of Act, No. X of 1859. The defendants (the respondents) undertook to prove that their tenures existed before December, 1790. The Principal *Sudder Ameen* decided on the 9th of April, 1863, that they had failed to do so and decreed in favour of the appellant That decree was affirmed on appeal by a division Bench of the High Court on the 14th of March, 1864. An application for a review of judgment was made on the 10th of June, 1864, on the ground, amongst others, that the appellant having stated that the lands were his *mál* lands, the Court had erred in throwing the *onus* of proof on the defendants. The review was admitted on this ground; and on the 24th of August, 1865, the Court made an order in these terms:—"A notice will issue to the other side, when the case will be argued, whether or not our decision, which has been over-ruled by a subsequent ruling of the Full Bench, should not be altered"; and on the 6th of September, 1867, the Court made the second order for a remand saying "the *onus* being on the *Zemindar*, he will be permitted to amend his plaint; and he will have to prove that the land is *mál* by showing that he has received rent for the same."

Their Lordships conceive that, subject to the point which will be subsequently noticed, the question, whether this remand was correct must be governed by their decision on the other appeal. They do not think that the order is vitiated by the specification of one amongst the various methods by which the plaintiff might prove his case. They do not conceive that the High Court really meant to limit him to that kind of proof.

1871.

Hurryhur Mookhopadhya v. Madab Chunder Baboo.

It was, however, argued by Sir Roundell Palmer that the remand of this particular case was improper, because the suit had already been finally decided in the appellant's favour, and ought not to have been admitted to a review, in order to give the defendants the benefit of what had been decided in other cases after such final judgment had passed. Their Lordships, however, observed that the application for a review seems to have been regularly made within ninety days of the date of the decree sought to be reviewed, pursuant to Sec. 377 of the Code of Procedure; and this being so their Lordships conceive that it was competent to the High Court to delay, if they did delay, their final decision on that application until the law on which so much doubt existed had been settled by the judgments of the Full Bench of the High Court, which have been already noticed. Therefore, in this case also, their Lordships think that the final order of the High Court was correct. They will, accordingly, humbly advise Her Majesty to dismiss both appeals. As the respondents have not appeared on either, it is unnecessary to say anything about costs.

NOTE.

Proprietors of lands in the Bengal Presidency are concerned with two classes of *lakhiraj* or revenue-free grants of land, *viz.*: I. Grants made *previous to the 1st December, 1790, and not exceeding one hundred bighas*, the revenue of which (when adjudged invalid) was, by Sec. 6 Ben. Reg. XIX of 1793, made over to the persons responsible for the discharge of the revenue of the estate within the limits of which the lands are situate. II. Grants *made after the 1st December, 1790, and whether exceeding or under one hundred bighas*. These grants (unless made by the Governor-General in Council) were declared to be in all cases null and void, and as they had been included within the limits of permanently settled estates, the proprietors of such estates were, by Sec. 10 of the Ben. Reg. XIX of 1793, authorized and required the alleged grantees, annex the lands to their estates, and collect the rents thereof.

There is an important difference, as respects the burden of proof in each class of cases. In the first class, or where the allegation is that the *lakhiraj* tenure was created before the 1st December, 1790, the burden of proof is on the alleged *lakhirajdar* or person setting up the revenue-free title. In such cases the Zemindar's right to resume is subject to the 12 years' rule of limitation. In the second class of cases, on the other hand or when the allegation is that the *lakhiraj* tenure was created *after the 1st December, 1790*, the burden of proof is on the Zemindar or proprietor to show that the land claimed as *lakhiraj* is part of his *mál* or rent-paying estate, and was assessed with the

1871

Hurryhur Mookhopadhya v. Madab Chander Baboo.

public revenue at the time of the Decennial Settlement. See also *Parvati-charan* v. *Ramkrishna*, B. L. R. Sup. Vol. F. B., 162 (165). In *Arjunnessa* v. *Peary Mohun*, I. L. R. 1 Calc., 378, the same principle was applied in the case of a representative of an auction-purchaser.

See however the recent case of *Sashibhusan Bakshi* v. *Mahomed Matain* (1906) 4 C.L.J., 548, which distinguished the case of *Hurryhur Mukhopadhay* v. *Madhabchandra* and it was held that when a purchaser at a *putni* sale proves his purchase and on his applying for possession is resisted by persons holding lands included within the ambit of the *putni* tenure, who set up the defence that the lands held by them are *lakhiraj* and not *mal*, it is for the defendants to prove that the lands have been held not under the *putni* tenure, but as *lakhiraj*.

NARENDRA NARAIN ROY

v.

ISHAN CHUNDRA SEN.[1]

[*Reported in 22 W. R., 22 F. B. ; 13 B. L. R. 274.*]

1874. April, 22.

This case was referred to the Full Bench by Markby and Birch, JJ., with the following remarks :—

MARKBY, J.—In this case it appears that on the 31st March, 1838, the *Zemindar* granted to one Kristo Chunder Doss a *pottah* of 301 bighas of *bunjor* waste land at a yearly rent of Sa. Rs. 18—13*a*. to hold the same by raising *bunds* and excavating tanks in, and by cultivating, the said land himself, or by means of tenants from generation to generation as a *mokurruree* tenure; and there was a stipulation that the rate of rent should never be changed.

Kristo Chunder held under the *pottah* until the 5th December, 1859, when the defendant purchased and got into possession and was accepted by the *Zemindar* as his tenant under the *pottah* in the place of Kristo Doss.

On the 6th May, 1871, the *Zemindary* was sold for arrears of Government revenue and purchased by the plaintiff, and on the 22nd September, 1871, the plaintiff delivered to the defendant a notice to quit.

Several objections were taken by the defendant, which have been found to be untenable; the only substantial question being that which we reserved for consideration, namely, whether the defendant is protected from being turned out by the proviso of section 37 of Act XI of 1859; in other words, whether he is a "ryot having a right of occupancy." If he is, although his rent may be enhanced according to law, he cannot be ejected.

This question was raised in the lower Court by the fifth issue in a somewhat inaccurate form, and we cannot say that either the evidence or the finding of the subordinate Judge

[1] *Present* :—The Hon'ble SIR RICHARD COUCH, Kt., Chief Justice, and the Hon'ble LOUIS S. JACKSON, J. B. PHEAR, W. AINSLIE and G. G. MORRIS, Judges.

1874.

Narendra Narain Roy v. Ishan Chunder Sen.

is quite as clear and as full as it might be; but upon the whole we think we may take it as established that the land, when the *pottah* was originally granted, was waste land without any tenant upon it; that Kristo Chunder entered upon the occupation himself; and that he brought a portion of the land into cultivation himself, and prepared the way for cultivating the remainder by excavating a large tank, and bringing tenants on to the land, by whom a further portion of the land was brought into cultivation. About two-thirds of the land appears to be now under cultivation, and all or very nearly all, of this is held by tenants under the defendant. The tenants appear to hold what are called *bhag-iotes*, that is to say, the defendant is entitled to a share in the produce.

Under these circumstances, we think that the tenure of Kristo Doss was in its inception a ryotee tenure. It was certainly not the tenure of what has been called a middleman, for he was the immediate occupier of the soil. Nor could it, in our opinion, be rightly called the tenure of a *talookdar*. The *pottah* confers no privileges upon the grantee other than those of an ordinary ryot, and contemplates that the grantee will bring the land into cultivation by his own personal exertions, as was actually the case. We, therefore, think that Kristo Doss was a ryot, and continued to be so down to the time when he sold his tenure to the defendant.

It seems to us also that the defendant is a ryot; he succeeded to a ryot, and there was nothing to change his *status*; if, therefore, he acquired a right of occupancy from Kristo Chunder, he is within the protection of the section. He had only been in occupation eleven years nine months and seventeen days when the notice was served upon him; he had, therefore, gained no right of occupancy himself, and there are many decisions of this Court that the possession of the transferee cannot be added to the possession of the transferor. The last of these decisions is in the 17 W. R., 179, and the only decision to the contrary (5 W. R., Act X, 55) must, we think, be considered to be over-ruled.

The questions to be decided are therefore reduced to these two:—(1) whether the right of occupancy which Kristo Doss had at the time of the sale to the defendant was transferred to the defendant? and (2) whether, if it was not so transferred, is it

1874.

Narendra Narain Roy v. Ishan Chunder Sen.

still in existence in Kristo Doss or his heirs, and being in existence, will it prevent the plaintiff from ejecting the defendant?

The first of these questions has been not unfrequently said to have been decided by a Full Bench in a case reported in 7 W. R., 528, and if that had been the case, this reference would have been unnecessary. But this case decides a totally different point, as may be seen by considering the circumstances out of which it arose. The defendant held a non-transferable tenure, and he had held it for more than twelve years. He then attempted to transfer it, but the *Zemindar* refused to recognize the transfer and sued him for his rent. The argument for the defendant was that because he had gained a right of occupancy, therefore that which was a non-transferable tenure had become a transferable one, and that, therefore, his liability ceased. The question was not referred because there were any conflicting decisions upon the point, but because of its importance, and as pointed out by the Full Bench, no cases had ever gone to this extent. No argument appears to us necessary to show that this decision has no bearing upon the subject now under consideration.

Of the other cases, the following have been relied upon in favour of the transferability of the tenure:—1 W. R., 86; *Id.*, 826; 4 W. R., Act X, 2; and 11 W. R., 405. The following have been relied on for the opposite view:—9 W. R., 522; 11 W. R., 162; 15 W. R., 152; and 17 W. R., 179. It is not easy in all these cases to be quite sure of the grounds on which they proceed, but it is not, we think, possible to reconcile all.

Besides these cases it may be convenient to refer to cases in which it has been held that the ryot by sub-letting his land does not determine his right of occupancy, 9 W. R., 344; 10 W. R., 113; and 12 W. R., 111.

There is also a case in which it has been held that if a ryot, having a right of occupancy, transfer his right to another, the right of occupancy is not thereby forfeited, and the *zemindar* cannot turn the grantee out of possession,—11 W. R., 94.

It is this last case which renders the second of the above questions necessary. There is, it is true, no other decision upon this very point, but it appears to us that the two questions are

1874.

Narendra Narain Roy v. Ishan Chunder Sen.

so closely connected as to make it desirable that both should be considered together. The two questions referred are, therefore, those above stated.

Baboo Sreenath Doss for the appellant contended, before the Full Bench, that though the defendant may be regarded as a ryot, yet he is not protected from being ejected from the land by reason of his not having a right of occupancy therein under the proviso of section 37 of Act XI of 1859.

The record shows that on the 6th of May, 1871, the appellant purchased the *zemindary* for arrears of Goverment revenue, and on the 22nd of September, 1871, he gave the defendant, who was then in possession, notice to quit the land. At the time when the notice to quit was given the defendant (respondent) had only occupied the land for a period of eleven years nine months and seventeen days. Section 6 of Act X of 1859 says :— "Every ryot who has cultivated or held land for a period of twelve years has a right of occupancy in the land so cultivated or held by him, whether it be held under *pottah* or not, so long as he pays the rent payable on account of the same." The respondent, having only been in possession or occupation eleven years, nine months and seventeen days, has therefore acquired no right of occupancy in the land himself. It is true that Kristo Chunder Doss, the original ryot, had a right of occupancy, because he had cultivated the land for upwards of twelve years from the time the *pottah* was given to him by the *Zemindar*; but Kristo Chunder Doss' right of occupancy cannot be transferred to the respondent, inasmuch as it has already been decided not only in the case of *Nunkoo Roy* v. *Mohabeer Pershad and others*,[1] but also by a Full Bench Ruling in the case of *Ajoodhya Pershad* v. *Mussamut Imam Bandi Begum*[2] that "a right of occupancy is not saleable."

Moreover, in the last paragraph of the judgment of Sir Barnes Peacock, p. 529 he says:—"Speaking for myself, I am not at all sure that a right of occupancy gained under section 6 of Act X of 1859 is necessarily heritable"; *vide* also the case of *Denobandoo Dey* v. *Ramdhone Roy*.[3]

A right of occupancy then is merely a personal right; it may be acquired by a ryot either by cultivating the land himself

[1] 11 W. R., 405. [2] 7 W. R., 528. [3] 9 W. R., 522.

1874.

Narendra Narain Roy v. Ishan Chunder Sen.

for twelve years and upwards, or it may be acquired by a ryot from his ancestor who had cultivated the land for that period.

In the case of *Bootee Singh and others* v. *Moorut Singh and others*,[1] Mr. Justice Phear says :—"It seems to us more than doubtful whether any evidence could establish that a bare right of occupancy under the Act was transferable irrespective of the will of the *Zemindar*"; *vide* also the case of *Tara Pershad Roy and others* v. *Soorja Kant Acharjee Chowdhry*.[2] Under the circumstances, therefore, Kristo Chunder Doss could not transfer his right of occupancy to the respondent.

With regard to the second question, it seems clear that though the right of occupancy is not transferred, it is still not in existence in Kristo Chunder Doss, because Kristo Chunder by having sold the land to the respondent, had entirely abandoned not only his right of occupancy, but also all title and interest in the land.

Baboo Gopal Lall Mitter, for the respondent, submitted that the right of occupancy which Kristo Chunder Doss held was transferable to the respondent under section 6 of Act X of 1859. The last paragraph of section 6 says :—

"The holding of the father *or other person* from whom a ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this section." The word *inherits* here has a wider signification than the mere limited one of succession from father or other ancestor to the son. It contemplates every right of succession which a ryot might derive not only from his ancestors, but also from any other ryot who has cultivated the land for twelve years or more. Otherwise, the words '*or other person*' in the Act are unnecessary and can have no meaning. It is idle to suppose that the words '*or other person*' mean *ancestors*, because if a ryot can inherit from his father, it necessarily follows that he can inherit from his grandfather or other ancestor independently of the words "*or other person*."

In the case of *Huro Chunder Goho and another Mr. A. D. Dunn*,[3] it was held that "where the Zemindar consents to the transfer of a tenure from one ryot to another, the possession of both must be considered to be continuous, and the right of occupancy to date from the time of the first holder."

[1] 20 W. R., 478. [2] 15 W. R., 152. [3] 5 W. R., 55.

1874.

Narendra Narain Roy v. Ishan Chunder Sen.

Again, in the case of *Mussamut Taramonee Dassee* v. *Birrasur Mozoomdar*,[1] the Judges say :—"The question then arises—Is a right of occupancy a transferable tenure? We think that it is so transferable. A right of occupancy is after all a perpetual lease, the holder of which cannot be ejected so long as he pays a fair and equitable rent. There are many similar rights common in different parts of Bengal such as the *jotes* of Rungpore, and the *howlas* and *neemhowlas* of Backergunge, which are in effect in no respect higher than that of a right of occupancy, inasmuch as they are mere personal rights, which are, and have always been, held transferable as well as heritable."

With regard to the second point, it has been clearly decided in the case of *Gorachand Moostafee* v. *Buroda Pershad Moostafee*,[2] that the mere transfer of a right of occupancy does not work as a forfeiture of the rights and interests of occupant ryots themselves in the land. Therefore, the respondent cannot be ejected, inasmuch as he is now holding from Kristo Chunder Doss, in whom the right of occupancy still exists, in spite of the transfer.

The judgments of the Full Bench were delivered as follows by :—

COUCH, C. J. (AINSLIE, J., concurring).—In the judgment by which this case is referred to us, it is found that Kristo Doss was a ryot, and he continued to be so down to the time when he sold his tenure to the defendant. The way in which the case comes before us does not allow us to consider whether Kristo Doss really was a ryot or not. We must take the fact as found by the two learned Judges. I wish to prevent its being assumed that upon the facts which appear in this case I should have found that he was a ryot.

The first question put to us is, whether the right of occupancy which Kristo Doss had at the time of the sale to the defendant was transferred to him?

This is a question which must be considered and answered independently of any custom. In answering it I wish particularly to be understood as not giving any opinion respecting rights of occupancy where there is a custom to transfer them. In these

[1] 1 W. R., 86. [2] 11 W. R., 94.

1874.

Narendra Narain Roy v. Ishan Chunder Sen.

cases the landlord or *Zemindar* may be supposed to have allowed the ryot to occupy according to the custom. If the ryot has by custom a right to transfer, the landlord may be supposed to have assented to the right of occupation which he gave to the ryot being transferred by him. There may be many cases in which a ryot may have a right by custom to transfer. We must exclude all these from consideration in answering this question.

In my opinion it is to be answered solely with reference to the words of section 6 of Act VIII (B. C.) of 1869, by which the right is given, not for the first time, but on which it now depends. And whether, when Act X of 1859 was passed, this was the creation of a new right in a ryot, or the recognition by the Legislature of an existing custom to allow the ryot to continue to hold, does not make any difference in the construction of the Act. If the Act creates a new right, we must look at the words of it for what the right is; and if it recognizes a custom, it recognizes it only to the extent expressed, and the result is the same.

The words of the section are that every ryot who shall have cultivated and held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under a *pottah* or not, so long as he pays the rent payable on account of the same; but this rule does not apply to *Khamar*, *nijjote*, or seer land belonging to the proprietor of the estate or tenure, and let by him on a lease for a term, or year by year, nor (as respects the actual cultivator) to lands sublet for a term, or year by year, by a ryot having a right of occupancy. The holding of a father or other person from whom a ryot inherits shall be deemed to be the holding of a ryot within the meaning of this section.

These words appear to me to point to a ryot having the right in land cultivated or held by him, and so long as he pays the rent, and to the right not being one which can be transferred to some other person. It is a right to be enjoyed only by the person who holds or cultivates and pays the rent, and has done so for a period of twelve years. It does not speak of his acquiring a right which he might, having acquired it, transfer or make use of as a subject of property, but it seems intended to secure to a ryot who has cultivated or held for

1874.

Narendra Narain Roy v. Ishan Chunder Sen.

twelve years a continuance of his cultivation or holding so long as he pays the rent. And the provision at the end of the section, by which the holding of a father or other person from whom the ryot inherits is to be deemed the holding of the ryot, supports this construction; for it appears to show that, except in that particular case, the holding must be entirely by the person who claims the right. This is a law which imposes a restriction upon the proprietary rights of the *Zemindar* or landlord, and a ryot cannot claim under it anything more than the words clearly give to him. There are not here, in my opinion, words of so doubtful a meaning that we should consider whether it would be just or equitable that the ryot should have the power to transfer. The ordinary construction of the words appears to me to be that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property which could be transferred. I would therefore answer the first question by saying that the right which Kristo Doss had at the time of the sale was not transferable. The question, as I have said, is solely upon the Act, and independent of the existence of any custom.

The second question is, whether if it was not transferred, is it still in existence, in Kristo Doss or his heirs, and being in existence, will it prevent the plaintiff from ejecting the defendant? Now, if a ryot, having a right of occupancy, endeavours to transfer it to another person, and, in fact, quits his occupation, and ceases himself to cultivate or hold the land, it appears to me that he may be righly considered to have abandoned his right, and that nothing is left in him which would prevent the *Zemindar* from recovering the possession from the person who claims under the transfer. And not only may he be considered to have abandoned it, but if the right which is given by the law is one which exists only so long as he holds or cultivates the land, when he ceases to do that by selling his supposed right and putting another in his place, his right is gone and cannot stand in the way of the landlord's recovering possession. If it were not so, the law would become nugatory. The position of things would be that the transfer by the ryot is invalid, and gives the transferee no right to the possession, but the ryot could not recover possession from the transferee as he would be

1874.

Narendra Narain Roy v. Ishan Chunder Sen.

bound by his act of transfer; nor could the landlord recover possession because the outstanding right in the ryot would be in his way. The result would be that, although the transfer is invalid, the transferee would be able to keep possession and to set the landlord at defiance. I think in this case it may be considered either that the ryot has abandoned his right altogether, and therefore it cannot be set up as an answer to the suit by the landlord for possession, or that his right has ceased, has been put an end to, because it existed only so long as the ryot himself continued to hold or cultivate the land. I would, therefore, in answer to the second question, say that any supposed right which may be in existence in Kristo Doss or his heirs will not prevent the plaintiff from ejecting the defendant.

JACKSON, J.—I entirely concur in the judgment which has just been delivered, and have very few words to add. I should be inclined to describe the right, whether created or recognized by section 6 of the Rent Act, as being a right resulting from the connection between the occupying tenant and the land which he occupies for a space of twelve years. The Act expressly declares that the holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot: and there I think one may say that the well-known maxim *inclusio unius*, etc., would apply.

As to the second question, the answer appears to me to be very clear, for by the sale out and out to another person, the ryot voluntarily terminates that connection between himself and the land which he had occupied which is necessary to the existence of the right of occupancy. The law allows a subletting by a ryot who has a right of occupancy, though it does not permit the growth of a right of occupancy within a right of occupancy. So long as the ryot having a right of occupancy merely sublets the land, he maintains that connection between himself and the land which is essential to the existence of the right; but when he has transferred his right to another, he no longer maintains that connection.

I wish also to say that I expressly concur in the observations which the Chief Justice made at the outset of his judgment, namely, that we are dealing with this case on the facts found by the learned Judges who referred it, and by that we are limited.

There is only one other observation which I wish to make as to the case which was referred to in 20 W. R., 139. I do not apprehend that the learned Judges, who decided that case, meant to suggest that after a ryot having a right of occupancy had parted with his right by transfer, and the *Zemindar* had evicted the transferee as having no right to occupy the land, the ryot might afterwards come in and insist upon the right he had voluntarily parted with as entitling him to enter upon the land. If, however, any such claim should hereafter be set up in any other case, it will doubtless have to be considered.

PHEAR, J.—I entirely concur with the Chief Justice. I understand the questions which are put to us to have reference solely to that peculiar right of occupancy which I may call the creature of section 6 of the Rent Law, and that in the matter which is now before us we are entirely disembarrassed, as the Chief Justice has said, of all considerations which might affect or enter into questions relative to the alienation of the right to hold and occupy land founded on the element of custom, or otherwise. And it seems to me that under this hypothesis the questions which have been put to us in this reference are both immediately answered in the negative when the view is taken of section 6, as I think it ought to be, to the effect that the right of occupancy which is the subject of this section is rather of the nature of a personal privilege than a substantive proprietary right. I think that there can be no right of occupancy under the terms of this section other than in a person who is cultivating or holding the land as a ryot in the situation which is mentioned in this section; and that therefore a person can only have this right who is actually cultivating or holding the land, and then only if he has cultivated or held the land as a ryot for a period of twelve years according to the rule for estimating that time which is prescribed in the section; and that rule is that only the actual cultivation or holding of the person who sets up the right, and in the case where he has taken the cultivation or the holding of the land by inheritance from a predecessor, then, constructively, the cultivation or holding of that predecessor, counts. The section does not give to any one other than the person who has actually held or cultivated land for the period of twelve years either by himself alone, or by himself and his predecessor, from whom he has taken by

1874.

Narendra Narain Roy v. Ishan Chunder Sen.

inheritance, together, the right of occupation which is the subject of the section. And if this is so, then it seems to be plain upon the facts which the reference brings before us that Ishan Chunder Sen, the defendant in the case, has not a right of occupancy in the land which is the subject of suit, because he has himself only cultivated or held it as a ryot for a period of a little more than eleven years, and the person, who preceded him in the cultivation or holding thereof was not one from whom he took it by inheritance. His predecessor in the cultivation or holding was Kristo Doss, from whom he took by purchase. In that state of things, he is not entitled by the words of section 6 to add any years of Kristo Doss' holding to the years of his own holding. And certainly Kristo Doss, in the view that I have taken of the section, can have no right of occupancy in the land, because he is not now cultivating or holding it, but, on the contrary, has long been out of the occupation of it; he has not cultivated it; he has not held it in any sense whatever during the period of the last eleven years and upwards. To use the words of the section, he is not a person who is occupying or holding the land.

The Second branch, also, of the second question which has been referred to us, seems to be answered in the negative by the decision which is reported in 20 W. R., 139—a decision, the correctness of which has not yet been impeached, supported by the decision in Special Appeal No. 1651 of 1872.[1]

I concur in the judgment which has been delivered by the learned Chief Justice, and have nothing substantial to add to it. I ought, however, perhaps to remark, with regard to an observation which has been made on the case reported in 20 W. R., 139, that it was obviously not the intention of the Bench which passed that decision to say anything judicially as to whether or not the grantors or transferors of the *jote* in that case still had, in the events which had happened, any right to require possession of the land at the hands of the *Zemindar*. All that that decision decided was that whatever the rights of the transferors as against the *Zemindar* might be, those rights did not prevent the *Zemindar*, under the circumstances of the case, from recovering possession of the land from a stranger.

[1] 20 W. R., 478.

1874.

Narendra Narain Roy v. Ishan Chunner Sen.

MORRIS, J.—I concur with the Chief Justice in thinking that both the questions referred to us should be answered in the negative.

NOTE.

Under Act X of 1859 as well as under Act VIII of 1869, B. C. occupancy rights were not transferable against the will of the landlord save by custom not mere usage; *Chandrabati* v. *Harington*, L. R. 18 I.A. 27; I. L. R. 18 Calc. 349; *Pallakdhari* v. *Manners*, I. L. R. 23 Calc. 179. Under the present law (Act VIII of 1885, Sec. 183), occupancy right is transferable if there is either usage or custom to the effect. Consequently non-transferable occupancy rights are not saleable in execution at the instance of any creditor of the raiyat other than his landlord seeking to obtain satisfaction of his decree for arrears of rent; *Viramali* v. *Gopinath*, I. L. R. 24 Calc. 355. Of course the sale is valid and effectual if it is held with the consent of the landlord, or if the sale is recognised by him by receipt of rent or otherwise; *Ananda* v. *Ratnakar*, 7 C. W. N. 572; *Dwarkanath* v. *Tarini Sanker*, 5 C. L. J. 289; I. L. R. 34 Calc. 199.

The transfer of a non-transferable holding is voidable only as against the landlord; if the landlord does not choose to contest it, it stands good. As between the transferor and transferee the transferor is estopped from setting up the invalidity of the sale; *Bhagirath* v. *Hafizuddin*, 4 C. W. N. 679.

NOGENDER CHUNDER GHOSE [1]

v.

MAHOMED ESOF.

[Reported in 10 B. L. R., 406 P. C.; 3 P. C. J. 151; 18 W. R., 113.]

1872. May, 25.

Their Lordships delivered the following judgment :—

The subject-matter in dispute on this appeal is a portion of *chur* land thrown up by the Kurnafoolee, a navigable and tidal river in the District of Chittagong.

The appellants are the representatives of one Anundonarain Ghose, and, as such, are the *Zemindars* of Turruff Tej Sing, situate on the eastern shore of the river. Their estate appears to have been, in 1837, the subject of a careful Government revenue survey, and, as then surveyed and settled, comprehended three mouzahs, named Kalagaon, Chukra, and Lakhera, of which the *chittahs* or measurement papers made on the occasion of that survey are set forth in the record.

The respondents, other than the Collector,—so far as it is necessary to notice them—are the co-sharers in an estate known as *Talook* Korebau Ally, and situate on the western shore or bank of the river. That estate was also surveyed and measured in or about the year 1839, and the *Chittahs* of one of the villages included in it, Bakolea, is set forth in the record.

These parties, though made respondents, have not appeared on the appeal, which has been therefore heard against them *ex parte*. Their title, however, has been fully and ably supported by the learned Counsel for the Government which is in the same interest with them.

From what has been stated, it appears that the estates of the appellants, and these *Talookdars*, whom it will be convenient to call the respondents, speaking of the Government, whenever it is necessary to do so, as the Government, were, as originally measured and settled, bounded and separated by the Kurnafoolee.

[1] *Present* :—The Right Hon'ble Sir James W. Colvile, Sir R. Phillimore, and Sir Montague E Smith.

Sometime before 1847, that river threw up in its main and navigable channel certain islands or *churs*, of which it is only necessary to specify two, *viz.*, Chur Durmeean and Chur Dukhin. A settlement of these was made by Government with the respondents in 1847; the revenue assessed on Chur Dukhin being Rs. 200-6-6. Anundonarain Ghose is said to have presented at least one petition complaining of this proceeding; but, for the purposes of this litigation, it must be assumed that the *churs* in question were the property of Government, and were duly granted to and settled with the respondents. And it appears from some of the proceedings, that they were treated as appurtenant to Mouzah Bakolea.

Before the end of 1852, the river had swept away the whole of Chur Durmean, but had formed another low *chur* in the vicinity of its site. Nor is there now, if there ever was, any question that this, which was known as Lami or Lamchi Chur, was settled by Government with the respondents in lieu of Chur Durmeean in December, 1852.

Besides this latter *chur*, however, the river had before 1854 thrown up a considerable quantity of other *chur* land towards it eastern shore. This included the land now in dispute or so much of it as was then above water. The record shows that Government determined to make no claim to this under Act IX of 1847 as an island thrown up in a large and navigable river, but that, having been claimed by several of the proprietors in the neighbourhood, it was, in order to prevent affrays, attached by the Collector until the right of possession should be determined, and thereupon became the subject of a proceeding under Act IV of 1840 before the Magistrate, who had to adjudicate on the *primâ facie* right to possession between no less than sixteen different claimants. That officer began by directing the *Daroga*h to make a local investigation and cause a map to be prepared. The result of this was the *Daroga*h's map No. 43, which is in evidence, and his report of the record. This map shows four principal *churs* on the eastern side of the then main channel of the river, A, B, C, and D. Of these A and B are colored green, and represent the land then in dispute. C and D are colored yellow, and are treated as *churs* not in dispute which had been settled with the respondents. D, their Lordships believe, is admitted to be the Lamchi Chur. Whether C is or

1872.

Nogender Chunder Ghose v. Mahomed Esof.

is not the Dukhin Chur, or whatever remained of that *chur* is, still matter of dispute. But it is perfectly clear that it was, in 1854, treated as *chur* land which had been settled with the respondents, and was then in their undisputed possession.

A was divided into several portions, and the result of the Magistrate's proceeding was to award possession of these two different claimants; Grindochunder Ghose and Sreemutty Noberungeny Dossee, who then, as managers or otherwise, represented the estate of Anundonarain Ghose, getting part, and the respondents getting the larger portion lying to the west of the old channel of the river which was adherent to their settled Chur D. It is, however, unnecessary to pursue this part of the case, since the title to no part of A is now in dispute. B was claimed by those who then represented the appellants' estate as a reformation on the site of that part of their Mouzah Kalagaon, which had been previously diluviated, or washed away by the river. It was claimed by the respondents as formed by "alluvion on the east of the Dukhin Chur, within the *chuck land* recorded in their decree of the appellate Court." The *Darogah* found that Chur B was an accretion to the *chur* marked C, which had been settled with the respondents. But he also found that it had been formed by alluvion in the place where the lands of Mouzah Kalagaon, belonging to the appellant's *Zemindary*, were formerly broken; and that during the ebb-tide men could walk on foot from the said Mouzah to the said *chur*. The Magistrate's proceeding shows how that officer dealt with the question of possession. He seems to have considered that the disputed *churs* being still under water at flood-tide, could not have been effectually in the possession of any of the parties; that claims founded on reformation upon a site capable of identification could not be tried in any but a regular civil suit, and that the adherence of the land in dispute to lands not in dispute constituted a *primâ facie* title by accretion, on which he ought to award possession. He accordingly did award possession of B to the respondents as the holders of the settled Chur C, and left those who represented the estate of Anundonarain Ghose to their remedy by civil suit. The date of this proceeding was the 22nd of December, 1854.

The present suit was accordingly brought by Mr. Fagan, who had been appointed Receiver of Anundonarain Ghose's

1872.

Nogender Chunder Ghose v. Mahomed Esof.

estate by the late Supreme Court of Calcutta. It was not, however, commenced until the 3rd of May, 1861, *i.e.*, more than six years after the date of the Magistrate's award. The appellants seek to account for this delay by attributing it to circumstances connected with the administration of Anundonarain's estate. However that may be, it is obvious that the consequences of this delay, in so far as it may have occasioned any difficulty in the determination of the questions between the parties by means of the loss of evidence, or the intermediate changes caused by the action of the river, ought to fall upon the appellants. The suit, as originally brought, was to recover possession of 71 drones of alluvial land; the defendants to it were not the only co-sharers in *Talook* Koreban Ally, but also Horo Lal Mohunt, another of the sixteen claimants before the Magistrate: and the lands appear to have been claimed partly as a reformation on sites forming part of the wholly or in part diluviated villages of Mouzahs Kalagaon, Chukra and Lakhera; and partly as an accretion to such reformed lands. The Collector, as representing Government, was afterwards made a party to the suit; Government having an interest adverse to the claim of the appellants, inasmuch as it was entitled to the additional revenue assessable on the lands in dispute, if they were an accretion to the *chur* land of the respondents; whereas it was not entitled to any additional revenue upon them, if they were a reformation on the appellant's lands, and, therefore, included within the limits of his formerly settled *Zemindary*.

The first proceeding in the suit which it is material to notice, is the local inquiry made under the order of the Court by the *Ameen* Moonshee Ashanoollah. His report bears date the 28th of December, 1861, and the map accompanying it is No. 7. The report and the map showed, among other things, that of the 71 drones of land claimed, between 8 and 9 drones composed or formed part of a *chuck* marked in the map with the Bengali letter (*kha*); and were in the possession of the defendant, Horo Lal Mohunt, though claimed adversely to him in another suit by one Abdool Mujeed. A compromise was afterwards effected by Mr. Fagan, as Receiver, and this person, who admitted the appellant's title, and there is no longer any question touching this portion of the land claimed, or with the Mohunt as defendant. The report and map also proved that

1872.

Nogender Chunder Ghose v. Mahomed Esof.

between 44 and 45 drones, forming other part of the land claimed, composed the *chuck* marked in the map with the Bengali letter "খ" (*kha*); and that they were held by the defendants, the co-sharers in *Talook* Koreban Ally on the strength of the Magistrate's award. The son and representative of Abdool Ali, one of these defendants, afterwards made a compromise with the Receiver (admitting the title of the appellants) in respect of his share which comprised between 4 or 5 drones of the disputed land. It is not easy, if possible, to distinguish these 4 or 5 drones on map No. 7 : but they are indicated on map No. 20, which will be afterwards mentioned. The result of this *Ameen's* investigation and his report was altogether in the appellant's favour. He found that all the land in the two *chucks* was a reformation on sites which, upon local inquiry and measurement, he succeeded in identifying with the *dags* appertaining to the diluviated *Mouzas* of the appellant's *Zemindary* ; and in paragraph 5 of this report, he seems to intimate that no part of Chur Dukhin was to be found in the disputed land ; and that the latter could not be identified by any *dags* as formed on the site of any part of the respondents' *Mouzah* Bakolea. The last sentence of this paragraph, however, suggests a doubt whether he clearly apprehended the respondent's case ; and did not make some confusion between Mouzah Bakolea, as originally settled, and the Chur Dukhin to which, as they alleged, the land in dispute had accreted. This map did not give in detail the *dags* by which the indentification of the site was said to have been established.

The suit, at this stage of it, was transferred from the Principal *Sudder Ameen* to the Zillah Judge, who caused a second local investigation to be made by another *Ameen* named Guggun Chunder Dutt. His report and the map made by him is that numbered 20. This report and map purporting to be founded on local survey, the comparison of *dags*, and the examination of witnesses, go to establish these facts : 1st, that the whole of the *chur* marked A in that map, being all the land that now remains in dispute, was a reformation on the site of the appellants', diluviated Mouzahs ; 2nd, that the *chur* marked B was a similar reformation, but comprised the lands in respect of which the compromises with the Mohunt and the heir of Abdool Ali had been effected ; and, 3rd, that the *chur* Dukhin,

settled with the respondents in 1847, had then been diluviated, no part of it being included in *chur* A, and its site being assumed to be identical with that of a sandy Chur in process of reformation near the western shore of the river. These conclusions were supported by, and in a great measure founded on, the supposed tracing and identification of the *dags* contained in the measurement papers of the appellants' estate as measured and surveyed in 1837. No attempt seems to have been made by this *ameen* to trace in the disputed land the *dags* of the respondents' Mouzah Bakolea or Kismut Dukhin Chur. His view of the formation of the *chur* in dispute is thus stated in the 5th paragraph of his report :—"The disputed *chur* has arisen on the site of the diluviated lands of the plaintiffs at first on the eastern part of the river, and gradually increasing, has accreted on the southern and eastern parts to the plaintiffs' original land. It is not seen that the alluvion began as accretion to the Kismut Dukhin *Chur* alleged by the defendants to be settled with them."

The suit was after this heard by the Judge, who erroneously dismissed it on the ground that it was barred by limitation. This was set right by a decree of the High Court dated the 22nd of June, 1863, which remanded the cause, directing the Judge to inquire and decide whether the whole or any portion of the land claimed was in the possession of the defendants for more than twelve years prior to the suit, and, if not, to try it on its merits and with reference to the provisions of Regulation XI of 1825.

The form of this remand seems to have led to another local investigation by a third *ameen* named Gour Mohun Biswas, whose report is dated the 10th of March, 1865, and whose map is numbered 29. The object of this investigation was to trace, in the disputed land, if possible, land which had been settled with the respondents in 1847, or at all events more than twelve years before the commencement of the suit. The report speaks of Mouzah Bakolea, but their Lordships conceive that the attempt really was to trace the *dags* of Chur Dukhin, which after the settlement and survey of 1847, seems to have been treated as appurtenant to Mouzah Bakolea. This report was altogether adverse to the contention of the respondents. The investigation occupied fourteen days, and its result was to show that the

1872.

Nogender Chunder Ghose v. Mahomed Esof.

boundaries of the respondents' settled land would fall within the then main channel of the river, and considerably to the west of the disputed *chur*. This report, therefore, by negativing the case of the respondents, went to confirm that made in favour of the appellants by the reports of the two other *ameens*.

The cause then came on for a second hearing before the Judge who tried it on the following issues:—1st, whether the suit was barred by limitation; and, 2ndly, whether the land in suit was a formation on or an accretion to the original site of land in the plaintiffs' estate; or whether it formed a portion of or an accretion to the land settled with the defendants. He found both these issues in favour of the appellants. He seems to have held that the first was determined by the result of the last local investigation, which showed conclusively that the disputed *chur* contained no part of the land settled with the respondents in 1847. On the second issue he found, in conformity with all the *ameen's* reports, that the land in suit was clearly a formation on the original site of the plaintiffs' estate, and was connected with it, and that the plaintiff was, therefore, entitled to be placed in possession of it.

This decision was reversed, and the suit dismissed on appeal to the High Court, by a decree dated the 1st of December, 1865, which, on a re-hearing on review before the same Judges, was confirmed by an order dated the 1st of April, 1867. The present appeal is against that decree, and that order on review.

Their Lordships cannot say that either judgment of the High Court affords satisfactory grounds for the dismissal of the appellants' suit.

The first deals only with the latest *ameen's* report, and explains away the effect of that by assuming that, in making his measurements, he may not have taken a correct starting point. The Zillah Judge, however, in his judgment, expressly states twice that no objection was taken before him to the *ameen's* starting point. The investigation was carefully conducted in the presence of the respondents' agents, and it is difficult to suppose that the objection would not have been taken, if there was any foundation for it. Again, the learned Judges of the High Court proceeded on the assumed incompatibility of the case thus made by the appellants with the state of things which existed in 1854 at the date of the Magistrate's proceeding.

They came to the conclusion that Chur Dukhin was the *chur* marked C in the *Darogah's* map ; that the Magistrate had carefully decided against the title set up by the appellants and in favor of the respondents ; that the disputed Chur B was an accretion to Chur Dukhin ; and that the latter had never been diluviated.

But if, for the sake of argument, it be admitted that C in the *Darogah's* map correctly represented what then remained of Chur Dukhin, it would by no means follow that what constituted C in 1854 had not afterwards been washed away, and the conclusion that it still existed as part of the land in dispute seems to be incompatible with the reports of all the *ameens*, and notably with that of the last. Moreover, as their Lordships have already observed, the Magistrate by his proceedings seems expressly to have declined to decide on the rights resulting from an identification of site, and merely to have held that the land in dispute, being adherent to C, was *primâ facie* to be treated as an accretion to it. Again, the judgments under appeal do not seem to their Lordships effectually to distinguish or deal with the questions raised in the cause.

It undoubtedly lay on the appellants, who were seeking to disturb the respondents' possession of nearly seven years' duration, to show a good title to the land in dispute. They seem to have set up an alternative title, claiming the land either as a reformation on a site identified with that of their diluviated Mouzahs, or as an accretion to their estate by reason of its being a formation opposite to their lands, and only separated from them by a small channel, fordable at low water. This latter was the question chiefly discussed on the review ; and if it had been the only ground on which the appellants could recover, their Lordships would have great difficulty in saying that they had made out a good title, or had shown that the Magistrate was wrong in treating the land in question as an accretion to the respondents' settled land represented by C, and in awarding possession of it accordingly. But it seems to their Lordships that, inasmuch as the result of all the local investigations, including that of the *Darogah*, was in favor of the assertion that the land now in dispute was a reformation upon the site of the appellants' diluviated Mouzahs, the Zillah Judge was right in finding that fact to be proved. The question then arises, what

1872.

Nogender Chunder Ghose v. Mahomed Esof.

is the legal result of such a finding? Is the *primâ facie* title to the land thus shown capable of being displaced by any better title existing in the respondents? According to their Lordships' view of the evidence, no part of Chur Dukhin at the date of the decree, formed part of the disputed land, which may be assumed to be correctly indicated by Chur A, in the map No. 20 of Guggun Chunder Ameen. They are, however, not so clear that Chur C, in the *Darogah's* map, did not correctly indicate what remained of Chur Dukhin in 1854. This supposition is no doubt inconsistent with the report of the last-named *ameen*, confirmed in some measure by the map of a Deputy Collector made in November, 1852 (No. 30), which also assigns a different site to the now diluviated Chur Dukhin. On the other hand, it is difficult to see how the award of the Magistrate ever came to be made, if C in the *Darogah's* map did not correctly indicate land settled with the respondents, and then in their possession. And this latter map is on that point consistent with the Collector's map, No. 46.

Whilst, therefore, their Lordships think that the appellants have established the identity of the site of the land in dispute with that of lands originally included in their *Zemindary*, and afterwards washed away by the river, they will, for the determination of this appeal, take as also proved, that the *chur* marked C on the *Darogah's* map, though it has since been swept away, existed in 1854 as a *chur* settled with, and in the possession of, the respondents, and that the land in dispute was then adherent to it. They here advisedly use the term "adherent," because it appears to them that there is an important distinction between mere physical adhesion and that "accretion" or *incrementum latens*, which, by reason of its gradual and imperceptible formation, is recognized by the law as belonging to the persons to whose land it is adjacent. In the present case, the evidence touching the manner in which the *chur* in question was formed, is extremely scanty; and their Lordships are by no means satisfied that it was such as would make the land an "accretion" according to the strict legal definition of the term.

Their Lordships have now to consider what is the law applicable to the facts thus found, and what are the rights of the parties thereunder. And the long and able arguments addressed to them on this subject, render it desirable to review the law of

alluvion which obtains in Bengal, as declared by the positive provisions of Regulation XI of 1825, or by the decided cases, which the learned Counsel for the respondents have contended cannot easily, if at all, be reconciled with each other.

The 1st section of the Regulation,—after specifying as the subjects which called for legislation the following cases, *viz.*, 1st, the throwing up of *churs* or small islands in the midst of the stream or near one of its banks; 2ndly, the carrying away of portions of land by an encroachment of the river on one side, and an accession of land at the same time or in subsequent years, gained by the dereliction of the water on the opposite side; and, 3rdly, similar instances of alluvion, encroachment, and dereliction on the seacoast bordering the southern and south-eastern limits of Bengal—enacts that the rules declared by the following sections shall have force of law throughout the Presidency of Fort William. The 2nd section provides that local usage, whenever it exists, shall prevail. The 3rd section that, when there is no local usage, the general rules declared in the 4th section shall be applied to the determination of all claims and disputes relative to lands gained by alluvion, or by dereliction either of a river or the sea.

This 4th section is divided into five clauses:—

The first deals with land gained by gradual accession (*i.e.*, alluvion in the proper sense of the word), and provides that it shall be considered an increment to the tenure of the person to whose land or estate it is annexed, subject to the right of Government to assess additional revenue upon it.

The second provides that the former rule shall not be applicable to cases of sudden avulsion, where the identity of the land is not destroyed, preserving in that case the rights of the original owner.

The third makes a *chur* or island thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, the property of the Government, if the channel between it and the shore be not fordable, but provides that, if such channel be fordable at any season of the year, the *chur* shall be considered an increment by alluvion to the tenure of the person whose estate is most contiguous to it, and shall be subject to the provisions of the first clause.

1887.

Nogender Chunder Ghose v. Mahomed Esof.

The 4th clause deals with *chars* in small rivers, the beds of which have been recognized as the property of individuals; giving them to the proprietor of the bed of the river. And the 5th clause provides that "in all cases of claims and disputes respecting lands gained by alluvion, or by dereliction of a river or the sea, which are not specially provided for by the foregoing rules, the Courts shall be guided by local usage, if any be established as applicable to the case; and, if not, by general principles of equity and justice.

Two observations arise on this statute:—

1. There is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of "alluvion," *viz.*, land gained by gradual and imperceptible accretion, the *incrementum latens* of the Civil law.

2. No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, reappears on the recession of the sea or river. But, on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case; which must, therefore, be determined by "the general principales of equity or justice" under the 5th rule.

That the right of the proprietor in the case last put exists and is recognized by law in India, is established by at least two cases decided at this Board, and therefore binding on their Lordships, *viz.*, the case of *Mussamut Imam Bandi and another* v. *Hargavind Ghose*[1] and the recent case of *Lopez* v. *Madanmohan Thakur*,[2] decided on the 11th July, 1870.

The former is a clear authority that the identity of the site may be established by maps and ancient documents; although by the long submergence of the land, all external marks and means of identification have been obliterated. It is not, however, very clear in that case whether the question between the parties was one of boundaries of the original estates; or of dispute between one party claiming the land as a reformation on his original land, and the other claiming it as an accretion under the first clause of the 4th section of the Regulation. The latter, however, was clearly the issue between the parties in the case of

[1] 2 B. L. R., P. C., 4; 4 Moo. I. A., 403.

[2] 5 B. L. R., 521; 13 Moo. I. A., 467.

1872

Nogender Chunder Ghose v. Mahomed Esof.

Lopez v. *Madanmohan Thakur*.[1] It may, however, be said that that case is distinguishable from the present by its peculiar circumstances, inasmuch as in the former the encroachment of the river had in the first instance swept away the surface of the plaintiffs' *Mouzah*, had made the defendant, who held lands behind those so swept away, for the first time a riparian proprietor; and because the plaintiff had, by the preparation of the *tanabundee* map and otherwise, taken peculiar precautions to preserve and protect his right in the soil against his neighbour as well as the Government.

It was, moreover, contended that some at least of the principles laid down in the case of *Lopez* v. *Madanmohan Thakur*[1] are in conflict with the previous decision of this Board in the case of *Eckowri Singh* v. *Hiralal Seal*.[2] That case had not been reported when that of *Lopez* v. *Madanmohan Thakur*[1] was decided, and does not appear to have been cited in the argument. Their Lordships cannot, however, perceive any inconsistency between the two judgments. The decision in the case of *Eckowri Singh* v. *Hiralal Seal*[2] seems to have proceeded on two grounds, namely, 1st, that it was not competent to the plaintiffs, who had alleged a title to the land as an accretion to their estate, to raise at the hearing of their appeal a different case, *viz.*, "one" simply of original ownership of the site of the lands reformed; and 2ndly, that, had such a title been properly pleaded, the evidence failed to establish the identification of the site. The case of *Mussamut Imam Bandi* v. *Hargovind Ghose*[3] is cited in the judgment which throws no doubt upon the validity of such a title if properly pleaded and proved.

Again, the learned Counsel for the respondents, and, in particular Mr. Pontifex, argued broadly that, by diluviation into a navigable river, land is permanently lost to the original proprietor, and becomes the property of the State; and in support of this proposition, they relied much on an American work, "Houk on Navigable Rivers," which they argued was the more deserving of attention, by reason of the similarity which exists between the great rivers of America and those of India in their conditions and mode of action. This authority,

[1] 5 B. L. R., 521; 13 Moo. I. A., 467.
[2] 12 Moo. I. A., 36.
[3] 2 B. L. R., P. C., 4; 4 Moo. I. A., 403.

1872.

Nogender Chunder Ghose v. Mahomed Esof.

however, does not appear to their Lordships to assist the respondents' case. The law of alluvion in America seems to be less favourable to riparian proprietors than that of India or of England. For Mr. Houk draws a distinction between estates consisting of a given quantity of land, and defined by a mathematical line, though by one on the margin of a river, and those of which the river is the nominal boundary. He holds that in the former case, alluvion, however small, and however gradually and imperceptibly formed, is the property of the State. And after dealing with this question, he says in S. 258 :—"Nevertheless, it is possible that, by the action of the sea, or a change of the channel of a river, the land so granted may be partly lost. No doubt in case afterwards the land should be washed up again, it would belong to the former owner of the estate originally purchased, and no further. While, however, the land is submerged in the river, title is in the State." This is consistent with the Civil law, Dig. Lib. XLI. tit. I., S. XXX, and with the law of England as declared in the passage cited in the case of *Lopez* v. *Madanmohan Thakur*[1] from Hale "De Jure Maris."

In India the point thus taken seems to be concluded by the authority of the decided cases. The learned Counsel did not contend for a distinction between a tidal river and a navigable river, which has ceased to be tidal. Their Lordships have no reason to suppose that, in India, there is any such distinction as regards the proprietorship of the bed of the river, though in respect of the mode of accretion, there must be some difference between the effects produced by the daily flux and reflux of the tide, and the changes which are mainly consequent on the annual floods. Now, if there is no such distinction, it is clear that the Ganges at Bhagalpore, as in the case of *Lopez* v. *Madanmohan Thakur*,[1] and at Patna, as in the case of *Mussamut Imam Bandi* v. *Hargavind Ghose*,[2] is a navigable, though no longer a tidal river, and, consequently, that these cases are direct authorities against Mr. Pontifex's proposition. Their Lordships accede to what is said in the case of *Lopez* v. *Madanmohan Thakur*,[1] to the effect that a proprietor may, in certain cases, be taken to have abandoned his rights in the

[1] 5 B. L. R., 521; 13 Moo. I. A., 467.
[2] 2 B. L. R., 4; 4 Moo. I. A., 403.

diluviated soil. It is unnecessary to consider whether this might not be the result of a successful application for remission of revenue under Act IX of 1847, s. 5. For in the present case, there is nothing from which such abandonment can be inferred. If an application for remission of revenue was made, that application was refused.

The appellants having then established a *primâ facie* title to the land in dispute as a reformation, the question is whether the respondents have a superior title to it as an accretion to their settled *chur*. It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site, unless it be that, where the accretion is so gradual as to be latent and imperceptible during its progress, the law, on grounds of convenience, presumes incontrovertibly that no other ownership can be shown to exist, and so bars inquiry.

In the present case it appears to their Lordships that such gradual and imperceptible accretion as the law contemplates is not proved, and that there are peculiar reasons why the title of the plaintiffs should be preferred to that of the defendants. The latter do not claim the land as an accretion to their original estate. They claim it as an accretion to the *chur* cast up by the river, and settled with them by Government. Let it be granted that the first effect of the retrocession of the river was to leave bare this *chur* in the midst of the stream, and that the land then cast up was beyond the confines of the plaintiffs' estate. The river continues to recede, more land appears and new land, though adherent to that first discovered, is really a deposit on the ancient site of the plaintiffs' land. Why should the ownership of that which is thus regained be altered by the fact that, from some accidental cause, land forming the outer edge of it first emerged as an island? The *Darogha's* map seems to show that this must have been the course of the river's action. Nor, as their Lordships have already observed, is there any trustworthy evidence which traces the history of the disputed land, or shows that, by gradual and imperceptible accretion, it became adherent to the *chur*, which upon the whole evidence must be taken to have now ceased to exist. Such a case as the present is very distinguishable from the ordinary case contemplated by the Regulation

1872.

Nogender Chunder Ghose v. Mahomed Esof.

in which a river, gradually shifting its channel in one direction, continually eats into one bank, and leaves the other, never ceasing to flow between the competing estates.

Their Lordships are not insensible to the difficulties of identification, and to the danger of encouraging claims of this kind on insufficient evidence. They lay down no rule as to the strictness of proof which the Courts in India may require in such cases.

They also consider that a title founded on the original ownership and identification of site is to be confined *primâ facie* to the reformation on that site. And if, in the present case, it had appeared that some part of the land in dispute had been thrown up beyond the original boundaries of the appellants' estate, a question might fairly have arisen between the appellants and the respondents whether that was to be taken to be an accretion to the estate of the former, or to the settled *chur* of the latter. But upon the evidence they are satisfied that the whole of the land which continues to be the subject of the suit is a reformation within the limits of the appelants' original estate. This being so, their Lordships are of opinion that the Zilla Judge was right in decreeing the whole to the appellants. And they will humbly advise Her Majesty to allow the appeal; to reverse the decree of the High Court; and to order that, in lieu thereof, a decree be made dismissing the appeal to that Court, and affirming the decree of the Zilla Judge. The appellants must have from the respondents, the plaintiffs in the suit the costs of the litigation in India and those of this appeal. There will be no order as to the costs of Government on this appeal.

NOTE.

This case was followed by a Full Bench of the Calcutta High Court as authority for the proposition that land reformed on an old site cannot be treated as land gained by alluvion within the meaning of Reg. XI of 1825; *Fahamidannissa* v. *Secretary of State*, I. L. R. 14 Calc. 67, affirmed by the Judicial Committee in I. L. R. 17 Calc. 590, P. C. See also *Kanta Prasad* v. *Abdul Jamir*, 8 C. W. N. 676.

SHAM CHAND KOONDOO

v.

BROJONATH PAL CHOWDHRY.[1]

[*Reported in 21 W. R., 94 F. B.; 12 B. L. R. 484.*]

1873.
December, 9.

This case was referred to the Full Bench by JACKSON and BIRCH, JJ., with the following remarks:—

JACKSON, J.—We think the point involved in this case should be referred to a Full Bench for decision, and the point to be referred should be this—The plaintiffs purchased on the 19th February, 1866, the right, title, and interest of Brojonath Pal and others in a certain jote which, it is admitted, is a transferable under-tenure. That sale was not confirmed, and therefore did not become absolute and final, until the 23rd June. Intermediately, the Zemindar brought a suit against the jotedars whose rights had been sold for arrears of rent, and having recovered a decree against them, caused the tenure to be put up to sale; and it was sold accordingly on the 4th June, that is to say, 19 days before the confirmation of the sale to the plaintiffs. The purchaser was one Kedar Nath, who afterwards conveyed his rights to Menoka Dossee, one of the defendants. The transfer under the circumstance was not registered; neither did the plaintiffs made any deposit of the rent due as allowed by Section 6 of Act VIII of 1865 (B.C.). Are the plaintiffs entitled to possession of the jote notwithstanding the sale of it in the rent suit?

The cases which have been referred to, and from which the conflict arises, are on the side of the plaintiff,—*Pran Bundhoo* v. *Surbo Sunduree*,[2] *Ram Buksh* v. *Hridoy Monee*,[3] *Tirthanund Thakoor* v. *Paresmon*,[4] *Samiraddi* v. *Haris Chandar*,[5] *Dowlut Gazee* v. *Moonshi Munwar*,[6] *Wahed Ali* v. *Sadiq Ali*,[7]

[1] *Present*:—The Hon'ble SIR RICHARD COUCH, Kt. Chief Justice, and the Hon'ble F. B. KEMP, LOUIS S. JACKSON, F.A. GLOVER, and C. POSTIFEX, Judges.

[2] 10 W. R. 434.
[3] 10 W. R. 446.
[4] 13 W. R. 449.
[5] 3 B. L. R. 49 A. C.
[6] 15 W. R. 341.
[7] 17 W. R. 417.

1873.

Sham Chand Koondoo v. Brojonath Pal Chowdhry.

and also a judgment of the Judicial Committee, *viz.*, *Forbes* v. *Luchmeeput Sing.*[1]

On the side of the defendents are:—*Khoobaree Rai* v. *Roghoobur*,[2] *Gopal Mandal* v. *Soobhudra*,[3] *Sheikh Afzal Ali* v. *Lala Gaurnarayan*[4] a ruling by the Full Bench, which however does not appear to bear distinctly on the point, *Doorga Persad* v. *Sreekisto Munskee*,[5] *Sadhon Chandra* v. *Guru Charan*,[6] *Grish Chunder* v. *Sheikh Jhaku*,[7] and *Anundlal Mookerjee* v. *Khalika Persad*.[8]

The judgments of the Full Bench were delivered as follows:—

COUCH, C. J.—The decision of the present question depends in my opinion upon the construction which is to be put upon sections 105 and 106 of Act X of 1859. These sections, I think, must be read together, forming as they do a provision for the sale of transferable tenures in execution of decrees for arrears of rent.

Section 105 says that if there is a decree for arrears of rent due in respect of an under-tenure which by the title-deeds, or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may, thereupon, be brought to sale in execution of the decree, according to the rules for the sale of under-tenures, for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force.

By "tenure" is meant, not the right or interest of any person in the land, but the holding or the interest which has been created by the lease; and giving to the word its plain and ordinary meaning, it is that which is to be sold. If this had not been intended and the person who obtained a decree for rent was to be only entitled to sell the right and interest of the person against whom the decree was obtained, it would not have been necessary to make the provision in this section, as the decree might be executed upon all his property in the same manner as any other decree. It seems to be that by providing that the tenure shall

[1] 17 W. R. 197. P. C.
[2] 2 W. R. 131.
[3] 5 W. R. 205.
[4] B. L. R. Sup. Vol. 519.
[5] W. R. Gap. No. (Act X) 48.
[6] 15 W. R. 99.
[7] 17 W. R. 352.
[8] 12 B. L. R. 489 (note).

be sold, more was meant than selling what is the property of the person against whom the decree had been obtained. And the words "according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof," may assist as in coming to this conclusion. The rent is not regarded as due from the person against whom the decree is obtained, but as due in respect of the tenure.

The words, in the latter part of the section, "other property," do not appear to me to limit the meaning of the first part. In many, if not in most cases, the tenure would be the property of the person against whom the decree is obtained; and then the words, "other property moveable or immoveable," belonging to the judgment-debtor, would not be inappropriate. I think it would be giving too great an effect to the words "other property," to say that they show that the intention of the Legislature was, not that the whole of the tenure should be sold, but only the right and interest of the judgment-debtor in it. When we compare the words of Act X with those of the Regulation which was repealed by it, and for which the provisions in Act X were substituted, it seems that some alteration of the law was intended. Act X professes to be an Act to amend the law, and not merely a consolidating Act. Many provisions in the Regulation are repealed and others are substituted for them. The part of the 7th clause of section 15 of Regulation VII of 1799 which would be applicable to the present question says,—"If the defaulter be a defendant *talookdar*, or the holder of any other tenure which by the title-deeds, or established usage of the country, is transferable by sale or otherwise it may be brought to sale by application to the Dewanny Adaulut, in satisfaction of the arrear of rent." This authorizes the sale where the defaulter, the person against whom a decree might be obtained, is the holder of the tenure. The Judicial Committee of the Privy Council in the case in 17 Weekly Reporter allude to these words, and consider that they are very material as to what cases were within the Regulation. They say (page 200)—"They were not the holders of any tenure, to use the words of Regulation VII of 1799, and were certainly not proprietors, in the words of the Regulation VII of 1819." In Act X words which are capable of a much wider meaning are substituted

1873.

Sham Chand Koondoo v. Brojonath Pal Chowdhry.

for the words of the Regulation. The Act says generally that if there is a decree for arrears of rent the tenure may be sold. There are no words limiting it to a decree obtained against the person who is at the time the holder of the tenure.

There is another difference between the Act and the Regulation which shows that it was the intention of the Legislature to give to the *Zemindars* a more effectual remedy than they possessed before. The 8th clause of section 15 of the Regulation directs that transfers shall be registered :—"As a further security to the *Zemindars* in maintaining their rights over the dependent *talookdars* continued under them, the latter are hereby required to register in the Sudder *Cutcherry* of the *Zemindaree* to which their *talooks* may be attached, all transfers of such *talooks*, or portions of them, by sale, gift, or otherwise, as well as all successions thereto, and divisions among heirs in cases of inheritance." But it does not provide, as Act X does in the proviso to section 106, that no transfer which is required to be registered shall be recognized, unless it has been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector. More stringent provisions in favour of *Zemindars* are inserted in Act X of 1859 than in the Regulation. It appears to me, taking sections 105 and 106 together with the proviso, that it was intended that the *Zemindar* should be at liberty to treat as the holder of the tenure, and the person whom he might sue for the arrears of rent, the person who is registered in his books as the owner, unless any one could show that there had been a transfer, and that there was sufficient cause for its non-registration. In such a case, a *Zemindar* might find that he had been suing the wrong person. Taking these sections together, I think that the *Zemindar*, having obtained a decree for arrears of rent, is entitled to sell the tenure; and that the person who has obtained a transfer which he has not registered, and cannot show a sufficient cause for not registering it, is bound by the sale, and cannot set up a title which he has acquired by a previous sale.

Section 106 appears to provide for cases where the *Zemindar* has sued the wrong person. The real proprietor may come in upon the condition of depositing the amount of the decree, and may show that he was the owner of the tenure, and

1873.

Sham Chand Koondoo v. Brojonath Pal Chowdhry.

should have been sued. That is a wholesome provision; for a suit might be brought collusively and a decree for the arrears of rent might be obtained, and the tenure be sold without the real proprietor being able to show that in fact that the arrears claimed were not due.

The opinion that I now state, and which I stated in a former case, when I sat with Mr. Justice Glover, is in accordance with the earlier decisions of this Court. And in the conflict of opinion which there is amongst the learned Judges of this Court, it is satisfactory for me to find that in the earlier cases the same was decided as I now propose that we should decide.

In the case in the 7 Weekly Reporter, which is a Full Bench Ruling, the late learned Chief Justice, no doubt, appears to have expressed an opinion contrary to this; but it does not seem to me that the decision there was upon the question which is now before us. The case in the Court in which the question had been decided were not referred to in that case, and were not in any way the ground of the reference to the Full Bench. From this I conclude that it was not then intended to refer the present question. What was referred was the question as to incumbrances, although, no doubt, the Chief Justice expressed an opinion on the question now before us. On the other hand, in the 6 Weekly Reporter, page 54, which was also a Full Bench case, Sir Barnes Peacock, appears, so far as we can gather from the language, to have been of the same opinion as myself. Under those circumstances, it seems to me that we are not bound by the decision of the Full Bench in the 7 Weekly Reporter, and I think the question now comes properly before this Full Bench to determine it independently of any previous decisions of this Court. Looking at it as a question under the Act, I think the answer ought to be that the sale under the Act did confer a complete title upon the purchaser.

KEMP, J.—I concur.

JACKSON, J.—I am of the same opinion with the learned Chief Justice. I also think that we are not concluded by the judgment of the Full Bench in the case in 7 Weekly Reporter. The decision of the Full Bench on that occasion appears rather to have been a decision upon a nearly similar

1873.

Sham Chand Koondoo v. Brojonath Pal Chowdhry.

point on a different ground than a decision upon the question now before us. If it were otherwise, no doubt under the rules for references to the Full Bench, we should probably have to govern ourselves by that decision. The simplest and only safe mode of deciding the question before us appears to be upon the construction of sections 105 and 106 of Act X of 1859, taking those sections along with the other sections of the Act. The modes of executing decrees passed under Act X were originally pointed out in the sections commencing with section 86 of that Act. The 86th section has been repealed, and is replaced by section 17 of Act VI of 1862 (B. C.). That section declares generally what the procedure open to a decree-holder is, in these words:—"Process of execution in any suit hereafter to be instituted under this Act, or under Act X of 1859, may be issued against either the person or the property of a judgment-debtor, but process shall not be issued simultaneously against both person and property."

Then in some of the subsequent sections particular remedies or modes of procedure are indicated in particular cases. Accordingly section 105 enacts—"If the decree be for an arrear of rent in respect of an under-tenure which by the title-deeds, or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure," etc. There is a limitation of that in section 108, where the person who has obtained the decree is a sharer in a joint undivided estate; otherwise, subject to the claim to be made under section 106, the decree-holder might apply for sale and the Court might proceed to sell the under-tenure. That procedure is quite separate from the course to be taken in respect of other immoveable property in respect of which I conclude the Court would sell the right, title, and interest of the judgment-debtor; but under sections 105 and 106 the tenure itself, I take it, is the thing to be sold. It is to be observed that the position of a claimant under section 106, and what the claimant has to do, are quite distinct from those of a claimant under the other sections of the Act. A claimant under section 106 is to allege that he is the proprietor of the under-tenure and was in lawful possession of it, and has to deposit in Court the amount of the decree. That is provided in respect of claimants with regard to under-tenures; and taking all

1873.

Sham Chand Koondoo v. Brojonath Pal Chowdhry.

the provisions of these two sections together, it seems to me clear that the Legislature contemplated a separate procedure, and intended that the Court should go on to the sale of the under-tenure itself. I concur, therefore, in thinking that the under-tenure in this case was liable to be sold, and that the plaintiff could not by reason of his intermediate purchase at a sale in execution of a decree of the Civil Court recover the under-tenure from the party who had purchased it at a sale under Act X.

GLOVER, J.—I concur with the learned Chief Justice.

PONTIFEX, J.—I agree with the learned Chief Justice.

COUCH, J.—The special appeal will be dismissed with costs.

NOTE.

This case lays down the principle that where a Zemindar has obtained a decree for arrears of rent of a transferable tenure against his registered tenant, he is entitled to sell the tenure, although such tenure may have passed into other hands than those of the judgment-debtor; such transferee is bound by the rent-decree and the sale thereunder, if he is not registered and cannot show a sufficient cause for not registering. See *Rash Bihari* v. *Perry Mohan*, I. L. R. 4 Calc. 346; *Ram Narain* v. *Ram Coomar*, I. L. R. 11 Calc. 562. Such an unregistered transferee however is entitled to have the sale set aside on grounds mentioned in Sec. 311, C. P. C. or Sec. 173, B. T. Act. (*Asgar Ali* v. *Ambuldia* 9 C. W. N. 134); but a regular suit will not lie to set aside the sale except on the ground of fraud (*Panye* v. *Hur Chander* I. L. R. 10 Cal. 496).

SONET KOOER
v.
HIMMUT BAHADOOR.[1]

[*Reported in I. L. R., 1 Calc., 391 ; 3 I. A. 92.*]

1876.
February, 11.

Their Lordships' judgment was delivered by

SIR J. W. COLVILE.—The question raised by this appeal, though short, is somewhat novel, and there appears to be little positive authority upon it.

It appears that Rajah Modenarain Singh, being a Hindu *Zemindar*, but having an illegitimate family by a Mahomedan lady domiciled in his house, granted the *mokurrari* in question in the name of one of the infant daughters of that family, Shurfoonnissa Begum. The grant was clearly intended to create an absolute and hereditary *mokurrari* tenure, inasmuch as it contains the essential words, "generation to generation," which in documents of that kind have always been considered to have that effect; and their Lordships do not find in the particular document any special terms which would distinguish it from a grant of an ordinary *mokurrari istemrari* tenure. It is clear on the evidence that Shurfoonnissa Begum died before her father, and not very long after the creation of the tenure; and further, that after her death, the father during his life, and afterwards his widows, who, by the Hindoo law, are his heirs, continued to receive the rent reserved from those in possession of the lands, the receipt for such rent being, with one exception, taken in the name of Shurfoonnissa, the original grantee, and in that exceptional case in the name of Buratee Begum, her mother. One of the questions raised by Mr. Doyne is, what effect ought to be given to that reception of rent as a recognition of the tenure and an answer to the present claim to resume the lands included in it.

From this receipt of rent after the death of Shurfoonnissa, which must have been well known in the family, an inference may undoubtedly be drawn that the *Zemindar* either originally intended to make the grant for the benefit generally of his

[1] *Present* :—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

illegitimate family, or after the death of his daughter was willing that it should have that effect; and it is difficult to suppose that the widows were not for some time willing to act on some such view of the transaction. It is impossible, therefore, to treat the parties in possession as mere trespassers. The recognition of their interest by the receipt of rent from them would constitute some kind of tenancy requiring to be determined by notice or otherwise. Their Lordships, however, are not prepared to say that this circumstance is of itself sufficient to defeat the claim of the plaintiff in this suit. They think that the ground upon which the decision of the High Court is to be supported, if supported at all, is that the plaintiff in the suit is not the person who, assuming the parties in possession to have no legal title, is entitled to recover the land by the destruction of the tenure. That, of course, raises the question which the High Court has dealt with; namely, whether, on the death of Shurfoonnissa without heirs, the right to the possession of the land reverted to the original grantor, or whether the tenure on such a failure of heirs should be taken to have escheated to the Crown.

The doctrine of escheat to the Crown in the case of a vacant inheritance was much considered by this Court in the case of *the Collector of Masulipatam* v. *Cavaly Vencata Narainapah*.[1] In that case the property in question was a *Zemindari*. The last male *Zemindar* had died, leaving a widow, who took a widow's estate, and upon her death there were no heirs of her husband to inherit the *Zemindari*. The *Zemindar* was, however, a Brahmin; and the point raised in the suit was that on that ground the estate was not subject to the law of escheat. This contention was founded on the text of Menu, which says:—"The property of a Brahmana shall never be taken by the King: this is fixed law"; and also on a passage in Nareda, where it is said:—"If there be no heir of a Brahmana's wealth on his demise, it must be given to a Brahmana, otherwise the King is tainted with sin." It seems to have been admitted in that case that the British Government had at least the same rights that the ruling power would have had under the Hindoo law, the question being whether that limitation which the Hindoo law was said to impose on the right of the Hindoo Rajah or King

[1] 8 Moo. I. A., 500.

1876.

Sonet Kooer v. Himmut Bahadoor.

was to prevail against or fetter the rights of the Crown. Lord Justice Knight Bruce, delivering the judgment of this Committee, said :—"It appears to their Lordships that, according to Hindoo law, the title of the King by escheat to the property of a Brahmin dying without heirs ought, as in any other case, to prevail against any claimant who cannot show a better title; and that the only question that arises upon the authorities is whether Brahminical property so taken is in the hands of the King subject to a trust in favour of Brahmins." And in a subsequent passage of the judgment he went on to say :—"Their Lordships, however, are not satisfied that the Sudder Court was not in error when it treated the appellant's claim as wholly and merely determinable by Hindoo law. They conceive that the title which he sets up may rest on grounds of general or universal law. The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a Brahmin, whom she succeeded as heiress-at-law. If upon her death there had been any heirs of her husband, those heirs must have been ascertained by the principles of the Hindoo law; but by reason of the prevalence of a state of law in the mofussil, which renders the ascertainment of the heirs to take on the death of an owner of property a question substantially dependent on the *status* of that owner. Thus the property being originally, and remaining, alienable, might have passed by acts *inter vivos* in succession to British subject, to foreign European owner, to Armenian, to Jew, to Hindoo, to Mahomedan, to Parsee, or to any other person whatever his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindoos and Mahomedans by positive Regulation: in other cases it rests upon the course of judicial decisions." And the final conclusion of the Committee was this :—"Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a Hindoo subject, though a Brahmin, dying without heirs; and they think that the claim of the appellant to the *Zemindari* in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely

or to the extent of a valid and subsisting charge, defeated by the acts of the widow Lutchmedavamah in her life time. In the latter case the Government will of course be entitled to the property, subject to the charge." In a subsequent case relating to the same estate, *Cavaly Vencata Narain apah* v. *The Collector of Masulipatam*,[1] the question was between the Collector, representing the Government, and a person claiming to have a valid and subsisting charge by an act of the widow—a charge which the widow was competent to create; and it was held that the Government took subject to the charge, and the suit was dismissed, but without prejudice to the right of the Collector, as representing the Crown, to redeem the charge and recover the estate. The property, no doubt, in this case was a *Zemindari*; but the decision seems to establish the principle, that where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, but will take it subject to any trusts or charges affecting it. There, therefore, seems to be nothing in the nature of the tenure which should prevent the Crown from so taking a *mokurrari*, subject to the payment of the rent reserved upon it.

It has been argued, however, that this *mokurrari*, not being an independent *Zemindari*, but being carved out of a *Zemindari*, stands upon a peculiar footing, and that, upon the failure of heirs, the *Zemindar* takes by right of reversion, or, if not strictly by right of reversion, that the tenure escheats to him as the superior lord rather than to the Crown. The *mokurrari* was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, as Mr. Doyne has shown, under Act X of 1859, even in a suit for rent. It could not have been forfeited for the non-payment of rent; for in such a case the *Zemindar* could only have caused it to be seized, put up for sale and sold to the highest bidder. It is, therefore, property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot, their Lordships think, be successfully argued that, having so passed, the estate would have determined upon the death of Shurfoonnissa (supposing it had been sold in her life-time) without heirs; for the grant contains no provision for the lessee of the estate created

[1] 11 Moo. I. A., 619.

1876.

Sonet Koer v. Himmut Bahadoor.

in such event. There seems, therefore, to be no ground for saying that the lands have reverted in the proper sense of the term to the *Zemindar*; and the only question is, whether, on the failure of heirs of the last possessor, he is entitled to take a tenure subordinate to and carved out of his *Zemindari* by escheat.

Their Lordships are of opinion that there is no authority upon which the power of taking by escheat can be attributed to the *Zemindar*. The principles of English feudal law are clearly inapplicable to a Hindoo *Zemindar*. On the other hand, it is clear that, if the *Zemindar* has not such a right, the general right of the Crown subsists, and must prevail.

On the whole, therefore, their Lordships think that the High Court have come to a correct conclusion in holding that, supposing the parties in possession have nothing but their possession to depend upon (a question on which their Lordships give no opinion), the superior title, under which alone they can be ousted from possession of the lands, is not in the *Zemindar* or his representatives, but in the Crown. They will, therefore, humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

Appeal dismissed.

NOTE.

It follows from the decision in this case that a grant of an estate in absolute hereditary *mokurari* tenure differs from an out and out sale of the estate, merely in this, namely, that the consideration in the latter case is paid and received once for all, while in the former case, the consideration, or where there is a *bonus* (generally called *selami*), a portion of it takes the shape of a sum of money or money's worth, called the rent, to be paid or rendered periodically in perpetuity. On the grant of such a tenure, no interest in the estate remains in the grantor, unless there is in the grant some valid clause of express reservation, except a charge to secure the due payment or rendering of the rent.

For the principle laid down in this case, see also *Nil Madhab* v. *Naruttam*, I. L. R., 17 Calc., 826, and *Secretary of State* v. *Haibatrao*, I. L. R. 28 Bom. 276.

MAHARANI RAJROOP KOER.

v.

SYED ABUL HOSSEIN.[1]

[*Reported in I. L. R. 6 Calc. 394 ; 7 I. A., 240 ; 4 P. C. J. 199.*]

1880.
July 13, 14.

Their Lordships' judgment was delivered by

SIR M. E. SMITH.—This was a suit brought by Maharaja Ramkissen Singh Bahadur to establish an asserted right to a *pain* or artificial watercourse and also to a *tal*, or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the *pain*. The Maharanee, the present appellant, is his widow. Several questions, arising in the suit have been finally disposed of in the Courts below, leaving for the decision of their Lordships the main question, which arose on the special appeal before the High Court as to the effect of the Statute of Limitations upon two of the obstructions complained of.

The facts necessary to raise this question may be shortly stated : The Maharaja and his ancestors were the owners of Mehal Sunaut Parwariya, in the district of Gya ; and the defendants were the owners of an estate called Mouza Mora. The system of irrigation claimed by the plaintiff embraces an artificial *pain*, which is fed by a natural river at a point to the south of the defendants' Mouza. The *pain*, which runs from the south in a northerly direction, after traversing other estates, enters Mouza Mora, and runs through it, and afterwards through other lands to the defendants' mehal. There is, branching from the main *pain*, a channel, or smaller *pain* which helps to feed the *tal* claimed by the plaintiff. The *tal* lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the *pain*, and partly by the rainfall from these hills. It appears that there is another channel in a lower part of the *tal*, which runs from it and joins the *pain* at a point near a bridge, described in the Munsif's map. It is said there were doors or sluices in the bridge by which the flow of the water had been, to some extent, regulated, but no

[1] *Present* :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

1880.

Maharani Rajroop Koer v. Syed Abul Hossein.

question now arises with regard to them. The obstructions complained of were twelve in number, consisting of dams, cuts, and other modes of obstructing or diverting the water from the *pain*.

The general result of the litigation below is, that the plaintiff succeeded in establishing his right to the *pain* as an artificial watercourse, and to the use of the water flowing through it, except that which flowed through the branch channel; but failed to establish his right to the water in the *tal*, except to the overflow after the defendants, as the owners of Mouza Mora, had used the water for the purpose of irrigating their own land. That, generally stated, is the result of the finding as to the rights of the plaintiff.

It was found in the Courts below that all the obstructions were unauthorised; and the plaintiff has succeeded below as to all the obstructions, except two, which are numbered No. 3 and No. 10. No. 3 is a *thuud* or channel cut in the side of the *pain* at a point below the bridge which has been spoken of. No. 10 is a *dhonga*, also below the bridge, and consists of hollow palm trees so placed as to draw off the water in the *pain* for the purpose of irrigating the defendants' land. No question arises here as to the fact that those two works are an interruption of the plaintiff's right; and he would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the Statute of Limitations.

The Munsif has found that the Statute opposes a bar to his claim. The Subordinate Judge was of a different opinion, and reversed the Munsif's decree. On special appeal to the High Court, the Judges of that Court concurred with the Munsif, and reversing the decree of the Subordinate Judge, affirmed the Munsif's judgment.

Before adverting to the Statute, it is necessary to see upon what facts the Courts based their decisions. It appears that the Munsif found that these obstructions had been made more than two, but less than twenty, years before the institution of the suit. The Subordinate Judge found, that the two obstructions were recently made; and it may be inferred from his disagreeing with the inferences which the Munsif drew from certain accounts which were produced, and the comments he made upon the

latter's judgment in dealing with those accounts, that he meant to overrule the finding of the Munsif that the obstructions had existed for two years. If they had not existed for that period, no question on the Statute can arise. The High Court, without going into the facts, construed the judgment of the Subordinate Judge as not overruling the Munsif on the question of fact, and therefore they assume that these obstructions had existed for more than two years before the institution of the suit.

Their Lordships are disposed to dissent from the view of the High Court, and to come to the conclusion that the Subordinate Judge really did intend to overrule the finding of the Munsif upon the fact of the length of time during which these obstructions had existed ; but assuming the fact to be as the Munsif and the High Court have regarded it,—namely, that these obstructions had existed for more than two, but for less than twenty years, they think that no provision of the Statute of Limitations interferes with the plaintiff's right to recover in respect of them.

The Limitation Act, No. IX of 1871, contains two sets of provisions, which are in their nature distinct. One relates to the limitation of suits, and prescribes the limitation of time for bringing suits after the right to sue has arisen. The other set relates to the manner of acquiring title and rights by possession and enjoyment. The latter provisions are contained in Part IV of the Act, and are introduced under the heading "Acquisition of ownership by possession." They enact a mode of acquiring ownership by possession or enjoyment. Section 27 is as follows: "Where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative), has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible." Then there is this provision, on which the judgment of the Munsif certainly proceeded, though whether the High Court proceeded on that, or on the part of the Act which relates to limitation properly so called, may be open to doubt. The clause is this : "Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

1880.

Maharani Rajroop Koer v. Syed Abul Hossein.

On the assumption of fact made by the Munsif that these obstructions had existed for more than two years before the suit, he might be right in finding that the plaintiff had not had peaceable enjoyment for twenty years ending within two years before the institution of the suit; and, therefore, that the plaintiff had acquired no title by virtue of this Statute. The object of the Statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that, in this case, there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Munsif and of the Subordinate Judge, are thus stated in the judgment of the High Court: "The evidence shows, and the Courts appear to have found, that the *pain* was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years—certainly more than twenty years—for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or inconvenience caused by the construction of the *pain*." This being an artificial *pain*, constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since, or at least down to the time of the obstruction complained of by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought to, refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendants' land by which the right was created. That being so, the plaintiff does not require the aid of the Statute; and his right, therefore, is not in any degree interfered with by the provision in the 27th section, upon which the Munsif decided.

1880.

Maharani Rajroop Koer v. Syed Abul Hossein.

This being their Lordships' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. Woodroffe upon the effect of the clause in the same 27th Section under the head "explanation," which defines what is to be considered an interruption. Nor is it necessary to consider the doctrine laid down in *Thomas* v. *Flight* [1] in the Court of Exchequer Chamber, and afterwards in the House of Lords, with reference to a similar clause in the English Prescription Act.

Their Lordships have already observed that it appears to be open to doubt whether the High Court did not base its judgment on the part of the Statute which relates to limitation properly so called,—namely, on Art. 31 of Part V of the second schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction." The judgment contains this passage: "We find that the plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time when such infringement took place." If the Judges really meant to apply the limitation of Art. 31 above referred to, their decision is clearly wrong: for the obstructions which interfered with the flow of water to the plaintiff's mehal were in the nature of continuing nuisances, as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. Indeed, S. 24 of the Statute contains express provision to that effect. For these reasons, their Lordships are of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and the judgment of the Subordinate Judge as regards these obstructions ought to be restored.

There remains to be noticed the contention raised as to the *tal*. Mr. Woodroffe has strongly argued that the findings as to the *tal* in favour of the defendants are wrong; and he further endeavoured to show by reference to the judgments that they were not conclusive on that part of the case. Their Lordships, however, find, that there are distinct judgments of the Munsif and of the Subordinate Judge to the effect, that the defendants

[1] 10 Ad. & E. 590; S. C. on appeal, 8 Cl. & F. 231.

1880.

Maharani Rajroop Koer v. Syed Abul Hossein.

had a proprietary right in the *tal* and to the use of the water in the *tal*, and that the plaintiff had no right to the *tal* or to the water in it, except to so much as flows out of it in a natural course to the plaintiff's *pain*. To that overflow they considered him to be entitled, but to no more. Their Lordships, therefore, have come to the conclusion that, this case being heard only on special appeal, it is not open to the appellant to impeach those findings; and that, therefore, so far as this part of the case is concerned, they must dismiss the appeal. The result is, that their Lordships will humbly recommend Her Majesty, that both the decrees of the High Court be reversed; that the decree of the Subordinate Judge be affirmed; and that the decree of the Munsif be modified in accordance therewith.

Mr. Woodroffe desired that the language of the Munsif's decree with regard to the enjoyment of the water in the *tal* should be modified. Their Lordships, having considered what was addressed to them on that subject, and the language of the Munsif's decree, are not disposed to interfere with it. The plaintiff having claimed the whole of water in the *tal*, they think that the Munsif had to determine upon that claim; and that, having given only a qualified enjoyment of the water to the plaintiff, it was necessary, in order to arrive at what that qualified right was, to define the prior right of the defendants. He has done this in language, which their Lordships, perhaps, would not have used themselves, but which is sufficiently intelligible. The Munsif having gone to the spot, and having taken apparently great pains with his decision, their Lordships are not disposed to alter or interfere with this part of his decree. Substantially it amounts to a declaration that the defendants are entitled to use the water of the *tal* for the irrigation of their estate. If this should be wastefully or improperly done with reference to the right declared to belong to them, it may be the subject of a future inquiry. Their Lordships will, therefore, humbly advise Her Majesty to the effect above stated.

Their Lordships have considered the question of costs. The plaintiff having failed as to part of his appeal, they will follow the course which the High Court took, and give no costs to either party.

Appeal allowed.

1880.

Maharani Rajroop Koer v. Syed Abul Hossein.

NOTE.

This case shows that Sec 26 of the Limitation Act of 1877 which corresponds to Sec. 27 of the Act of 1871 does not exclude or interfere with other titles and modes of acquiring easements. Where the enjoyment of an easement has lasted more than twenty years such enjoyment may be referred to a legal or lawful origin, although such enjoyment having been interrupted more than two years before the institution of the suit was not sufficient to establish title under the Act; in other words, the Act is remedial and neither prohibitory nor exhaustive.

Two points however must be noted. In the *first* place, if the origin of the use or possession is known, it would rebut the presumption of lawful origin; in the *second* place, the length of the period of enjoyment necessary to raise the presumption is left indefinite by the decisions on the subject; but as the period of prescription is fixed to be 20 years, the period for immemorial prescription can hardly be taken to be shorter; See *Kailas* v. *Sanaton*, I. L. R. 7 Calc. 132.

It is possible however that enjoyment for a period shorter than twenty years coupled with other circumstances may justify an inference of an actual grant.

The principle of this case was applied by the Judicial Committee in the case of pasture lands, *Bholanath* v. *Midnapore Zemindary Co.*, I. L. R. 31 Cal. 503, P. C.

WATSON & CO.

v.

RAMCHAND DUTT.[1]

[*Reported in I. L. R., 18 Calc., 10; L. R. 17 I. A. 110.*]

1890.
April, 25.

The judgment of their Lordships was delivered by

Sir B. Peacock.—Gungaram Dutt, Ramchund Dutt, and Pudmalochun Dutt were brothers, and constituted a Hindu family joint in estate. They also carried on business as money-lenders.

In the year 1877 Pudmalochun executed two deeds of endowment, or *nirdes patras*, one on the 24th of July, and the other on the 12th of December. On the former of those dates the three brothers were entitled to a 12-annas share or twelve-sixteenths of pergunnah Silda in *Zillah* Midnapore, which they held under three *putni bynama patras*; the first for a four-annas share dated the 29th Sraban 1268, and registered on the 20th of August 1861; the second dated the 3rd Cheyt 1276 Amli, corresponding with the 14th of March 1869, for a six-annas share; and the third dated 13th Kartik 1283, for a two-annas share.

The property was subject to the ordinary law of Bengal, according to which upon the death of any one of the brothers the share of the joint property to which at the time of his death he might be entitled, would descend to his heirs. Pudmalochun had no son; but in 1877, at the time of the execution of the deed of the 24th July, he had a wife, a daughter Bamasundari Dasi, one of the appellants, and a grandson, the only son of that daughter. His wife died in his lifetime, between the dates of the two deeds. He himself died on the 26th of October, 1879, and upon his death his daughter was his heiress. The Watsons, appellants, claim through her. It is contended on behalf of the respondents that Pudmalochun divested himself of his one-third of the 12-annas share held in *putni* by the deeds of endowment executed by him.

[1] *Present*:—Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.

It is not necessary to review the evidence in detail. It was carefully considered by the District Judge. It seems clear that from the time of the execution of the deed of the 24th of July, 1877, until after the death of Pudmalochun, a period of about three years and three months, no change took place in the accounts, or in the management of or dealing with the business or estates, or the proceeds thereof. Mortgages were executed, in which Pudmalochun joined, and everything appears to have gone on in the same manner as if the deeds had never been executed, except that the family idol was removed from the house of Gungaram to that of Pudmalochun. No act was done by Pudmalochun or his brothers in which he was described as *shebait*.

Their Lordships concur generally with the District Judge in his findings of fact, and they are of opinion that it was not the intention of Pudmalochun or of his brothers that the deeds should be acted upon, or that Pudmalochun should thereby divest himself of his share of the property. The deeds were merely fictitious, or *benami*.

In arriving at that conclusion their Lordships agree with the District Judge that the deed of the 24th of July did not profess to postpone any of its avowed objects until the death of Pudmalochun, or to any period subsequent to the execution of the document, except in so far as it related to the allowance to Bamasundari or her son Upendra Nath. They cannot concur with the High Court that the provisions relating to that allowance were the chief provisions of the deed, or that the deed purported on the face of it to postpone the gift, so far as it related to religious objects, to any future period.

It was strongly urged on behalf of the plaintiffs, on the argument of the appeal, that the receipt by Bamasundari, after her father's death, of three monthly payments of the allowance provided for her by the deed was inconsistent with the fact that the deeds were not intended to take effect; but their Lordships do not attach much importance to those receipts. Bamasundari was a widow, maintained by and residing in one of the houses which formed part of the estate; she had apparently no means for embarking in litigation; she was then, so far as it appears, living on friendly terms with her uncles, and if she had not at that time received the allowance which

1890.

Watson & Co. v. Ramchand Dutt.

on the face of the deeds was provided for her, she probably would have received nothing.

After the execution of the deeds of endowment, and during the lifetime of Pudmalochun, a *maurasi istimrari mokarrari pottah* of another two-annas share of Silda was granted to Ramchund in consideration of the sum of Rs. 25,000.

It having been considered that Pudmalochun did not by the deeds of endowment divest himself of any part of the joint family property, the *mokarrari pottah* must be assumed to have been purchased with funds of the joint family, and to have enured for the benefit of the three brothers.

From the facts above stated it appears that at the time of his death, Pudmalochun was entitled to a one-third undivided share of a 14-annas or fourteen-sixteenths share of Silda, of which twelve-sixteenths were held by the three brothers in *putni* and two-sixteenths under the *mokarrari pottah*; that the other two brothers were entitled to the other two-thirds thereof; and that the interest of Pudmalochun descended upon his death to his daughter Bamasundari. Out of her interest in the *putnis*, Bamasundari, on the 6th Assin 1292, after the commencement of the suit, granted a *darputni* to Bholanath Dhur, who on the 5th of November, 1884, granted a *seputni* to the Watson defendants.

Their Lordships are of opinion that at the date of suit the interest of the plaintiffs in the lands in suit was only two undivided third parts of an undivided share of 14-annas or of fourteen-sixteenths of Silda; that Bamasundari was at that time entitled to the other undivided third part thereof.

At the time of the death of Pudma the Watsons held the 14-annas share which belonged to the three brothers Dutt under leases, in respect whereof they paid rent to the Dutt brothers, and which leases expired on 31st Bhadro 1290 Amli, corresponding with the 14th of September, 1883. After the expiration of the leases the Watsons, who were entitled to the remaining two-annas undivided share of Silda under an *ijara pottah* from Rani Doorga Kumari Debi, of the 6th Bysack 1290 Amli, corresponding with the 17th of April, 1883, continued in possession of the portion of Silda which comes under the head of *khas*, and to cultivate and sow it with indigo as they had done during the continuance of the leases. Their Lordships

1890.

Watson & Co. v. Ramchand Dutt.

cannot, upon the evidence, say that that was such an improper course of cultivation or use of the land as to render an injunction the proper remedy.

The plaintiffs endeavoured to sow oil-seeds, and to prevent the Watson defendants from continuing the cultivation in which they were engaged; the Watson defendants persisted in the cultivation which they had commenced; quarrels and even riots ensued and the plaintiffs commenced the suit in which the appeals have been preferred. They prayed to be put into *ijmali* possession of their 14-annas share, to have damages awarded to them at the rate of 8 annas per bigha on 6,894 bighas, and similar damages until they should be put into possession; also for a permanent injunction prohibiting the defendants from sowing indigo, and from allowing anybody else to do so without the consent of the plaintiffs, and from throwing any obstacles in the way of the plaintiffs' holding *ijmali* possession.

The sixth issue laid down for trial was, "What is the extent of the plaintiffs' interest in the land in suit?" Upon this the District Judge held that the plaintiffs were entitled to two-thirds of the 14-annas share of the *khas* lands of Silda specified in the decree, and to get joint possession of the same with the Watson defendants. The High Court, on the contrary, having arrived at the conlusion that the deeds of endowment were intended to take effect, that Padma thereby divested himself of his interest in the property, and that no part of it descended to his daughter Bamasundari, held that the plaintiffs were entitled to the whole of the 14-annas share.

The decree of the District Judge, after reciting the claim, and specifying the lands included in the 6,894 bighas, proceeded, amongst other things, as follows:—"That a decree be passed in the following manner:—That by reducing the quantity of land claimed, *viz.*, 6,894 bighas, to 4,128 bighas, the plaintiffs' right is established to a two-thirds share of the 14-annas and the plaintiffs are entitled to get joint possession of the same with defendants No. 1 (that is, the Watsons); and that on payment of excess court-fees proportioned to the excess of amount found due over the valuation of the plaint, calculated at the rate of 8 annas per *bigha* of the decreed lands from the beginning of 1291 Amli until the date of possession, the plaintiffs

1890.

Watson & Co. v. Ramchand Dutt.

shall get two-thirds of a 14-annas share in accordance with the decision of the 6th issue. The Court further directs that an order of injunction be issued to the defendants No. 1, prohibiting them from either themselves or through others sowing indigo on those *khas* lands of Silda on which indigo is being now grown."

The High Court modified that decree, and ordered that, instead of a two-thirds share of 14-annas of the *khas* lands of Silda, the plaintiffs were entitled to get joint possession with the defendants (the Watsons) of the entire 14-annas of the said lands; they increased the amount of compensation accordingly, and varied the injunction granted by the District Judge.

Their Lordships are of opinion that the judgment and decree of the High Court are erroneous and ought to be reversed, with costs, and that the decree of the District Judge ought to be modified and partly reversed. It was contended on the part of the plaintiffs, respondents, that the acts of the Watsons amounted to what in England is called an actual ouster, and that the plaintiffs were entitled to a decree ordering them to be put into *ijmali* possession with the defendants, but it appears to their Lordships that the plaintiffs have not established a right to have such a decree; and for the same reason they think that so much of the decree of the District Court as declares that they are entitled to get joint possession ought to be reversed. It seems to their Lordships that if there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession. Their Lordships are further of opinion that the decree of the District Judge, so far as it orders an injunction to be issued, ought to be reversed. It appears to their Lordships that, in a case like the present, an injunction is not the proper remedy. In India a large proportion of the lands, including many very large

estates, is held in undivided shares, and if one share-holder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a word which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if, in a case of share-holders holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other share-holder to appropriate to himself the fruits of the other's labour or capital.

Upon the whole, their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to order the plaintiffs, respondents, to pay the costs incurred by the defendants in that Court and further to declare that the plaintiffs, respondents, are entitled to only two-thirds of 14-annas, or of fourteen-sixteenths of the *khas* land, or, in other words, to two-thirds of seven-eighths of the 1,128 *bighas*, the quantity of the *khas* lands as determined by the decree of the District Judge; also to reverse the decree of the District Judge so far as it declares that the plaintiffs are entitled to get joint possession with defendant No. 1; and also so far as it directs that an order of injunction be issued; also to reverse that portion of the decree which orders "that, on payment of excess court-fees proportioned to the excess of the amount found due over the valuation of the plaint, calculated at the rate of eight annas per *bigha* of the decreed lands from the beginning of 1291 Amli until the date of possession, the plaintiffs shall get two-thirds of 14-annas share, in accordance with the decision of the 6th issue," and in lieu thereof to order and declare that the plaintiffs do recover from the defendant No. 1 a sum of money calculated at the rate of two-thirds of seven annas

1890.

Watson & Co. v. Ramchand Dutt.

per bigha a year for 4,128 bighas, as compensation in respect of the exclusive use and benefit by the defendant No. 1 of 4,128 bighas, from the beginning of the year 1281 Amli to the 4th of January, 1886, the date of the said decree; also to affirm the decree of the District Judge so far as it relates to costs.

It may be right to mention, with reference to that portion of the decree above recommended which relates to compensation, that the rate of eight annas per bigha was not disputed by the Watson appellants, and that the High Court were not prepared to dissent from the finding of the District Judge in fixing the area of the *khas* lands at 4,128 *bighas*.

The respondents must pay the costs of this appeal.

Appeal allowed.

NOTE.

This decision as also the decision of the Judicial Committee in *Lachmeswar Singh* v. *Manowar Hossein*, I. L. R. 19 Calc. 253 P. C., are the leading authorities upon questions of right of joint possession of joint lands as between co-owners. The principle deducible from the two cases is that if joint property is used by one co-sharer consistently with the continuance of the joint ownership and possession without exclusion of the co-sharers who do not join in the work, there is no encroachment on the rights of any of them as regards common enjoyment, so as to give ground for a suit. In the leading case, it was held that an exclusion of co-sharers had taken place, but that the excluded co-sharers were entitled to money compensation at a proper rate in respect of the exclusive uses; it was also held that as the co-sharer in possession had not denied the title of the others, but was in occupation in the profitable use of the land in good husbandry, the plaintiff could not obtain a decree for joint possession, or damages, or injunction. In the case of *Luchmeswar* v. *Manowar*, which related to the exclusive user of a ferry started by one co-sharer, it was held that the defendant had made use of the joint property in a way quite consistent with the continuance of the joint ownership and joint possession, and that consequently the Court would not interfere with the enjoyment of the property.

Reference should also be made to *Mohesh Narain* v. *Nuebut Pathak*, 1 C. L. J. 437; I. L. R. 32 Calc. 837, *see post*, which related to the joint possession of a hillside and in which the principles applicable are formulated.

RADHA PROSAD SINGH

v.

BAL KOWAR KOERI.[1]

[*Reported in I. L. R., 17 Calc., 726 F. B.*]

1890.
June, 2.

The opinions of the Court (PETHERAM, C.J., PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.) were as follows :—

PETHERAM, C. J.—This was a second appeal which arose out of a suit brought by the plaintiff to recover a balance of rent at the rate of Rs. 22-2 per *annum*. The defendant by his pleader, on the settlement of issues, stated that he was tenant to the plaintiff of the land in question at a rental of Rs. 18-10-6, and the Munsif fixed as the first issue for trial—Is the defendant's rental Rs. 22-2 as alleged by the plaintiff, or Rs. 18-10-6 as alleged by the defendant? And the questions which arise in the second appeal and in this reference are upon that issue. Both the Munsif and the District Judge, before whom the case came on appeal in the first instance, have found upon this issue that the defendant's rental is Rs. 18-10-6. The case has been brought before the High Court on second appeal, and the plaintiff contends,—*first*, that there was no evidence on which the Munsif and the District Judge could come to such a finding; *second*, that even if there was some evidence, the Judge's judgment shows that he has so misunderstood the plaintiff's case, and has so misapplied the law, that his finding on the facts may be re-opened in this Court on second appeal; and, *thirdly*, that even if the rent is found to be Rs. 18-10-6 only, the plaintiff is still entitled to recover the larger sum of Rs. 22-2, the balance being made up of items which are neither uncertain nor arbitrary, and which the evidence shows the defendant agreed to pay as part of the consideration for his occupancy of the plaintiff's land.

To discover whether these contentions are well founded, it is necessary to see what was the evidence which was given in the case. The suit, both before the Munsif and the District Judge, was heard along with thirteen others relating to the same *mouzah*, and they are all governed by the same judgment.

The plaintiff, in order to prove that the defendant's rent was Rs. 22-2, called the defendant himself, and also required him

[1] *Present* :—SIR W. COMER PETHERAM, Kt., Chief Justice, Mr. Justice PRINSEP, Mr. Justice PIGOT, Mr. Justice O'KINEALY, and Mr. Justice GHOSE.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

to produce his receipts for rent for the years 1286 to 1292, inclusive. The defendant did not produce the receipts; and secondary evidence of their contents was given by the plaintiff, who produced the corresponding counterfoils which were in the following form :—

No. D. A. 1678.

Dumraon Raj.

"No. 2" ... ... Re. 1 (one rupee).

Date 25th Kuar 1286.

Mohit Koeri Kashtkar, inhabitant of Ramu Baria, through self, on account of rent, as per details of Mouzah Ramu Baria, Pergunnah Bhojepore."

"Out of (the rent of) the year 1286 Re. 1 (one rupee)

Received one rupee.

(Sd.) ADINATH RAI,
Tehsildar.

By his own pen.

(Sd.) DEO NARAIN LAL PATWARI."

These counterfoils showed that in several of the years from 1286 to 1292 the defendant had paid the exact sum of Rs. 22-2 and that the yearly payments had always been within a few pice of that sum.

The plaintiff also put in his *jamabandis* for those years, which were in the following form :—

Annual Jamabandi of Mouzah Ramu Baria for the year 1286.

Serial number.	Name of tenant.	Nakdi land.	Bhoodi land.	Total quantity of land.	Nakdi rent.	Bhoodi rent.	Total rent.	Sarr.	Total Rupees.	Road Cess and Public Works Cess.	Jumma (total) rent.	Arrears.	Jumma (total) rupees.	Paid.	Balance.	Deduct amount sued for.	Balance.
		B.C.D.		B.C.D	Rs. A.		Rs. A.		Rs. A.	Rs. A.	Rs. A.	Rs. A.	Rs. A.	Rs. A.	Rs. A.		Rs. A.
23	Mohit Koeri	4 10 14	...	4 10 14	22 2	...	22 2	...	22 2	0 11	22 13	1 6	24 3	22 2	2 1	...	2 1

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

The defendant in his evidence said :—

"I am defendant in suit No. 156. I know that *sarak*, *khurach*, *chanda*, *neg*, *batta* are in the rental, because I have been paying them. *Batta* is included in my rental of Rs. 18-10-6. I do not object to this *batta*. I do not recollect if I have paid all the *abwabs* separately from or with the rental proper. I do not know if receipts were called for. Receipts are not preserved. I do not remember from whence *sarak*, *neg*, *khurach* and *chanda* have been collected.

The plaintiff also put in the *sehas* for those years when it appeared that they were kept in the following form :—

DUMRAON RAJ.

Maharaja Radha Prosad Singh, Saheb Bahadur, proprietor, Pergunnah Bhojepore.—Seha (account) of individual tenants in the tehsil (collection) of Adinath Rai, the tehsildar of Mouzahs Ramu Baria, etc., for the week commencing from the (1) *25th of the month of Kuar 1286 and ending with the 25th of the month of Kuar 1286 Fasli.*

Date of Seha.	No. of Seha.	English letter and number entered in the receipt form.	Name of cultivator with residence.	Name of mouzah wherein the holding for which rent is paid is situated.	Arrears for the current year.	For the Current Year.				Arrears with Specification of Years.						Grand Total.
						Land rent with *batta* and *sarak* (road fund cess), &c.	Mamum (fee), Roadcess and Public cess.	*Ilaqa* money.	Interest.	Year.	Land rent with *batta* and *sarak* (road fund cess), etc.	Mamum (fee).	Road cess and Public Works cess.	*Ilaqa* money.	Interest.	
						Re.										Re.
*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
...	2	1678	Mohit Koeri inhabitant of do.	Do. (Ramu Baria).	...	1	...	...	...	...	...	...	...	...	...	1

(1) *Sic.* in original.

The plaintiff called his *tehsildar* and *putwari*, the latter of whom said that in the *Zemindari* accounts of certain years *batta*, *sarak*, etc., were entered in separate columns. The

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

defendant filed an authenticated copy of the plaintiff's *jamabundi* for 1279, which was in the following form :—

1279.

Mouzah Ramu Baria, Pergunnah Bhojepore, Property of Maharaja Radha Prosad Singh Ji Bahadur—Annual jamabundi of individual tenants.

Name of Tenant.	Quantity of land.	Land rent.	Road cess.	*Batta.*	Putwari's mug (fee)	Usual charges.	Grand Total.
*	*	*	*	*	*	*	*
'Mohit Koeri							
Bgs.C.Dh. Rs. A. P. Rs. A. P.	Bgs.C.Dh.	Rs. A. P.	Rs.A.P.	Rs.A.P.	Rs.A.P.	Rs A.P. (1)	Rs.A.P.
[Kodar 2 12 0 5 0 0 14 4 0	4 10 14	18 10 6	0 3 0	1 10 0	0 14 6	0 5 3	21 7 0
Baharsi 1 18 14 2 8 0 4 6 6							
4 10 14 18 10 6							

(1) *Sic.*

Upon this evidence the Munsif found as a fact that the defendant's rent was Rs. 18-10-6. He considered that the *jamabundis* filed by the plaintiff were fabricated; that the receipt filed by him merely showed the amount paid, and did not prove conclusively that the whole of the money paid by the defendant was on account of rent only, and that the *jamabundi* for 1286, together with the *sehas*, showed that the difference between Rs. 18-10-6 and Rs. 22-2 was not rent at all, but was made up of various impositions and charges, and he accordingly found the first issue in favour of the defendant. When the matter came before the District Judge on appeal, he affirmed this finding of the Munsif. And the first question which has been argued before us has been whether there is any evidence on the record to support this finding. I think there is. The defendant himself stated that his rent was Rs. 18-10-6; the *jamabundi* of 1286 indicated that at that time the rental was Rs. 18-10-6, and the *sehas* for the subsequent years indicated

that even if it be assumed that the form of the *jamabandi* had been changed since that time, the fact still remained the same; that the sum of Rs. 22-2 claimed by the plaintiff was made up of the rent with other charges added to it, and whether they were evidence for the plaintiff or not the *sehas* were clearly evidence against him. The second question then arose, and the plaintiff contended that if there is some evidence on the record that the rent was the smaller sum, it is apparent from his judgment that the District Judge has so entirely misunderstood the case that his finding of fact may be reconsidered on second appeal. In the fifth paragraph of his judgment he says :—

"The plaintiff will not tell us the exact date of the 'consolidation'; but at last gives us about 1286 F. These modern consolidations cannot, as this Court has often ruled, be made by the *malik* alone. He must secure the acquiescence of the tenants concerned. There has, therefore, been no 'consolidation,' as alleged."

And Mr. Woodroffe, on behalf of the plaintiff, says that it is apparent that the Judge thought that the plaintiff, in order to succeed, must prove a consolidation of the rent and other items by some particular agreement come to between the parties at some specified time; that with this in his mind he compelled the plaintiff's pleader to mention some time, and that when he mentioned "about 1286," assumed that the plaintiff's contention was that the consolidation was effected by the change of the form of the *jamabandi*, and that as that was the act of the landlord alone, it would not bind the tenant; whereas the plaintiff's case was that the form of the *jamabandis* and receipts prove that the rent has always been the larger sum, and that the other figures merely show the mode of calculation by which the rental was originally arrived at.

If this was the view of the Judge as to what the plaintiff's real case was, I cannot say that he was wrong. The *jamabandi* of 1286 shows that the Rs. 22-2 was made up of that sum and various other items, and the *sehas* for the subsequent years, which, as I have before said, are certainly evidence against the plaintiff, show to my mind that the Rs. 22-2 always contained something other than rent, though they do not show what it was. These documents, in my opinion, rebut the inference of

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

fact which may no doubt be drawn from the receipts, that the rent since 1286 has been enhanced to the sum of Rs. 22-2, of which fact the receipts for three years are made evidence by section 29 of the Bengal Tenancy Act, and prove conclusively to my mind that the change in the *jamabandis* was one of form only, representing no fresh agreement between the parties and made by the landlord with the intention of consolidating the other items with the rent, which he could not do except by agreement with the tenant.

I agree, then, with the Munsif and the District Judge that the rental was Rs. 18-10-6, and that the difference between that amount and Rs. 22-2 is made up of the items mentioned in the *jamabandi* of 1286, and upon this finding the third question arises, which is the question upon which the case of *Padma Nund Singh* v. *Baij Nath Singh* [1] appeared to the referring Bench to be in conflict with that of *Chultan Mahton* v. *Tilukdhari Singh*.[2]

The case of *Chultan Mahton* v. *Tilukdhari Singh* [2] was decided in January, 1885, before the passing of the Bengal Tenancy Act. The suit was by *ticcadars* to recover from a ryot Rs. 1,105-1-2 as arrears of *nagdi* and *bhowli* rent for the years 1286 to 1288, together with certain customary *abwabs*. The nature of the *abwabs* appears in the report of the case to have been certain in this sense that the amount depended on the amount of the rent or of the produce of the land when the tenure was *bhowli*. It was found as a fact that according to the custom of the estate, of which the defendant's land formed a part, these items had been paid by the defendant and his ancestors for many years, so that it appeared that they were not uncertain or arbitrary, but were always paid, the amount of them each year being merely a matter of calculation. Mr. Justice Mitter, at page 183, says as to this :—

"It has been next contended that although the disputed items in the plaintiff's claim are described in the plaint as old usual *abwabs*, and in the *Zemindari* accounts also they are designated as *abwabs* separate and distinct from the specified rent, yet they are not *abwabs*, but part of the rent. This contention is mainly based upon the ground that anything which

[1] I. L. R., 15 Calc., 828. [2] I. L. R., 11 Calc., 175.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

is certain and definite does not come under the class of *abwabs* the imposition of which is prohibited by the Regulations. Although the Regulations did not clearly define what an *abwab* is, still I think it cannot be maintained that anything which is definite and certain is not an *abwab* under the Regulations, although the parties to the contract may call it so. It seems to me that the Regulations, without defining accurately what an *abwab* is, left this question for the determination by the Court in each case upon the evidence. I cannot find anywhere in the Regulations the precise definition of the word *abwab* which would justify me to treat the disputed items of claim as part of the specified rent, although the plaintiff claims them in the plaint and enters them in the *Zemindari* accounts as *abwabs*."

And the Full Bench held that nothing beyond the *nagdi* and *bhowli* rent could be recovered, any contract for the payment of the other items, whether express or implied, not being enforceable.

This case came before the Privy Council on appeal.[1] The judgment of the High Court was affirmed. Lord Macnaghten, in delivering judgment in speaking of the items in question, says :—

"Unquestionably they have been paid for a long period; how long does not appear. They are said to have been paid according to long-standing custom. Whether that means that they were payable at the time of the Permanent Settlement or not is not plain. If they were payable at the time of the Permanent Settlement, they ought to have been consolidated, with the rent under section 54 of Regulation VIII of 1793. Not being so consolidated, they cannot now be recovered under section 61 of that Regulation. If they were not payable at the time of the Permanent Settlement, they would come under the description of new *abwabs* in section 55, and they would be in that case illegal."

By this judgment I understand the Privy Council, while affirming that of the High Court, to go beyond it and to hold that under the Regulations nothing could be recovered for the occupation of land, except one sum which must include everything which was payable for such occupation arrived at either

[1] I. L. R., 17 Calc., 131 ; L. R., 16 I. A., 152.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

by agreement or by some judicial determination between the parties, and that any contract, whether express or implied, to pay anything beyond that sum, under any name whatever, for or in respect of the occupation of the land, could not be enforced.

After the decision by the High Court of the case which I have now considered, but before the decision by the Privy Council, the present Bengal Tenancy Act (VIII of 1885) came into force. The sections of that Act which are material to consider are section 3, sub-section 5, by which rent is defined to be "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant," and section 74 which enacts that all impositions upon tenants under the denomination of *abwab*, *maktut* or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void." After this Act had been passed, but before the decision of the Privy Council, the case of *Pudma Nund Singh* v. *Baij Nath Singh* [1] was decided by a Division Bench of the Court. In that case the plaintiffs sued to recover Rs. 2,830-13-3 for arrears of rent and for *tehwari* and *salami* due to them for the years 1290 to Baisakh 1293 in respect of a *mokurari* tenure held under them by the defendant. The basis of the suit was a *kabuliyat*, dated 25th December, 1869, by which the defendant agreed to pay a certain fixed rent, *plus* a small annual addition for items designated therein as *tehwari*, *dusara*, and *salami towzi*, in respect of which items the amounts declared to be payable were Rs. 9 and Rs. 2, respectively. The only question was whether the *tehwari* and *salami* could be recovered. The learned Judges held that as the items in dispute were not arbitrary and uncertain in their character, but were specific sums which the tenants had agreed to pay to their landlords, they were in fact part of the rent agreed to be paid and were not *abwabs* at all. They considered that what is or is not an *abwab* must depend on the circumstances of each particular case in which the question arises, and they allowed the plaintiff's claim. It is clear that this case may be reconciled by the judgment of the High Court in the other case, as Mr. Justice Mitter expressly says

[1] I. L. R., 15 Calc., 828.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

that the question whether the disputed item is an *abwab* must be decided by the Court in each case; but if I have correctly understood the judgment of the Privy Council in the same case, it is equally clear that it cannot be reconciled with that, as that decided that nothing can be recovered from the tenant except the one sum fixed as the tenant of the land, and in this view, I think, we must hold the case of *Pudma Nund Singh* v. *Baij Nath Singh* [1] to be overruled by the decision of the Privy Council in that of *Chultan Mathon* v. *Tilukdhari Singh* [2] and that unless the law has been changed by the Bengal Tenancy Act in favour of the landlord, the items in dispute in this action cannot be recovered, as they have been proved to be something beyond the sum which had been agreed upon as rent. The definition of rent in section 3 of the Act does not, in my opinion, affect the question, as that would have been the correct definition of rent without the assistance of the Act, and consequently was so at the time of the decision of the Privy Council, and the only question is as to the meaning of section 74. I think that the effect of that section is to declare the law to be as it is laid down by the Privy Council in the judgment which I have cited, and to be that no imposition under any name whatever shall be recovered from the tenant for or in respect of the occupation or tenure of the land beyond the sum which has been fixed for rent, whether the sum has been fixed by agreement or by judicial determination between the landlord and the tenant.

In my opinion the portions of the claim which are objected to are illegal, and cannot be recovered as rent, and the second appeal should be dismissed with costs.

O'KINEALY, J.—In this case the plaintiff, a *Zemindar*, sued the defandant, his ryot, for arrears of rent due on account of the years 1290 to 1293. The plaintiff alleged that the rent was Rs. 22-2 per annum. The defendant, on the other hand, contended that it was only Rs. 18-10-6, and that he had paid that sum. He also added that the difference between Rs. 18-10-6 and Rs. 22-2, claimed by the plaintiff, consisted of illegal cesses which has been incorporated with the original rent.

In the first Court the plaintiff examined his *putwari*, his *tehsildar*, and the defendant, in support of his case. The

[1] I. L. R. 15 Calc., 828. [2] I. L. R. 17 Calc., 131; L. R., 16 I. A., 152.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

jamabundis, or collection papers from 1286 to 1292, were also produced as corroborative evidence.

The Munsif held that the *jamabundis* from 1286 to 1292 had been fabricated in order to support a false case. He has also held that the amount claimed as rent included *abwabs*, such as *sarak*, *khuruch*, *neg*, and *batta*; he found that the proper rent was what the defendant alleged it to be, and on that basis he decreed the arrears found to be due.

The plaintiff appealed to the lower Appellate Court. He argued that the Munsif should have found whether the amounts claimed to be included in the *jama*, and disallowed by the lower Court, were legal cesses or not, and he urged that the *onus* of proving that illegal taxes were included in the rent claimed, lay on the defendant. He further asserted that the Munsif was wrong in saying that the *jamabundis* produced on the part of the plaintiff were not genuine, and asserted that the plaintiff's claim was proved by the statements of the defendant and the papers admitted by him. These contentions seem to have failed before the Judge in the lower Court. He came to the same conclusion in regard to the *jamabundis* as the Munsif, and he agreed with that Judge in thinking that the sum stated by the defendant was the *asul jama*, while the amount claimed by the plaintiff as the yearly rent was made up of the *jama* with other items, such as *sarak*, *khuruch*, *neg*, and *batta*.

This being the case, and the suit being a suit for rent, he refused to grant the items in excess of the annual rent, because, in his opinion, it was not rent, and the plaintiff ought not to succeed on a different title. He therefore dismissed the appeal.

From that decision a second appeal was preferred to this Court, and before the division Bench it was contended on behalf of the plaintiff, that the defendant having for many years paid the sums claimed and taken receipts as if the amounts paid had been rent without any specification of the items *sarak*, *khuruch*, *neg*, and *batta*, he was bound to pay rent at that rate, and the Court below ought to have held that there had been not only a consolidation of these sums with the rent, by an implied agreement by the defendant to pay the whole amount as rent.

So far as I can see that is not a valid ground of second appeal. In the case of *Meer Makomed Hossein* v. *Forbes*, their Lordships of the Privy Council say[1]—

"The case was before the High Court upon Special Appeal, and, therefore, in strictness, they had nothing to do with the evidence in the cause."

In the more recent case of *Pertap Chunder Ghosh* v. *Mohendro Parkit*,[2] decided by their Lordships on the 29th June, 1889, there is the following passage:—

"Their Lordships have doubted whether the Judges of the High Court, in hearing the appeals, had regard to the provision in the Code of Civil Procedure (Act XIV of 1882), section 584, as to appeals from appellate decrees, and thought they were at liberty to consider the propriety of the findings of the District Judge upon questions of fact. Certainly there are some passages in their judgment, particularly in the latter part, if not in the former, which suggest this. Their Lordships must observe that the limitation to the power of the Court by sections 584 and 585 in a second appeal ought to be attended to, and the appellate Court ought not to be allowed to question the finding of the first appellate Court upon a matter of fact."

In this case two Courts have come to the same conclusion on a matter of fact, which goes to the foundation of the case, namely, what was the rental of the defendant; and they have decided adversely to the appellant. This seems to me to conclude the case, and to render it impossible for us to decree the second appeal in favour of the appellant.

In this view of the case it would seem unnecessary that I should answer the question referred to this court namely, "whether the portions of the claim that are objected to as coming under the denomination *sarak*, *neg* and *khurach*, are illegal cesses, or whether they are recoverable as rent by reason of their having been paid for a long time along with rent and without any specification in the rent receipts"; but as the Judge in the Court below has forwarded as part of his judgment a decision on the nature of *abwabs*, and a majority of the Judges composing the Full Bench think that it should be answered, I think it is better to give my opinion.

[1] L. R. 2 I. A., at p. 6.

[2] L. R. 16 I. A. 233, at p. 238; I. L. R. 17 Calc., 291, at p. 298.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

In order to determine what was the meaning of rent under old Regulations, and what were the cesses and assessments that they were intended to prohibit, it is necessary to see what the law was before the time of the Permanent Settlement; what the evils were that the Legislature then intended to get rid of, and how they attempted to do it.

Before the acquisition of Behar by the East India Company, the distinction between rent and revenue can hardly be said to have existed. Both were looked upon as the dues of Government, rather in the form of a tax on land than as rent. Thus in Regulation XLIV of 1793,[1] we find it declared that, according to the established usages of the country—and these, according to 24 Geo. III (1784), chapter 25, section 39, were to guide the Directors in fixing the income of Government from land—these dues consisted of a certain proportion of the annual produce of every *bigha* of land demandable, according to the local custom, either in money or kind. This right was a right peculiar to the state alone. So that as long as the Moghul Government was strong enough to govern the provincial rulers, taxation, so far as it fell upon land, may be said to have been substantially of a fixed nature. In Behar the *Zemindar* divided the produce of the lands with the cultivators in stated proportions; and in Bengal a settlement was made with the ryot upon a standard called the *asul*, or original rate, with the accumulation of taxes successively imposed upon it. These taxes were divided into *abwab* and *mahtut*, and in calculating the *Zemindary* demand, now called rent, the *Zemindars* levied the *asul* or ground-rent according to the *jamabundi*, or assessment, of each village, and the excess imposed, if *abwab*, according to the rate of the *pergunnah*, and if *mahtut*, according to the rate of each *chukla*. These two, namely, the *asul* and *abwab*, constituted the whole land revenue demand imposed on the ryot prior to and after the British rule. To illustrate this, I print from Mr. Shore's Minute the following abstract [2] of a ryot's account taken about the year 1781 :—

	Rs.	As.	G.	K.
Rent of 7 bighas 12 cottahs 7 chittacks of land of various produce, calculated at a certain rate per bigha according to its produce ...	14	0	8	0

[1] Preamble. [2] Fifth Report, Vol. I, p. 163.

Abwab cesses.

	Rs.	As.	G.	Rs.	As.	G.	K.
Chout at 3-16 per rupee ...	2	10	0				
Pulbundi, a half mo. demand or ¼-4 of the *jama* ...	0	7	2				
Nuzzerana, 1 mo. or ½ ...	1	2	15				
Mangan, 1 mo. or ½ ...	1	2	15				
Foudari, 3-4 of 1 mo. amount or 1-16	14	15	0				
Company's *nuzzerana*, 1¼ mo. ...	0	1	7				
Batta, 1 anna per rupee ...	0	0	14				
				8	12	2	0
Total ...				22	12	10	2
Khelat, 1½ anna per rupee				2	2	1	2
Total *jama* ...				24	14	12	0

As I have stated above, the assessment of land revenue was the right of the Government alone, and as a fact the Government, when in full vigour, supervised the assessment year by year. *Abwabs* were in their nature unconstitutional; but from the beginning of the 18th century, when the *subahdars* were becoming more independent, they began to levy new perpetual imposts now called *subahdari abwabs*. These viceregal imposts were levied by the *subahdars* in a certain proportion to the *asul*, or standard of assessment, and the *Zemindars* who paid were authorized to collect them from the ryots in the proportion of their *asul*, or standard of assessment, and sometimes these cesses were incorporated with the original *asul*, so that the aggregate became a new *asul*, or standard of assessment, according to which the assessments on land were subsequently levied.

Besides being unconstitutional, there was another objection to these assessments, namely, that they confirmed the *Zemindars* within the *subah* in the exaction of their *abwabs* and in increasing their amount in an arbitrary manner not authorized by the *subahdar*. The result was that the incorporated *subahdari abwabs* in some instances amounted to 33 per cent. of the *asul*, while the *Zemindari abwabs* amounted to somewhere about 50 per cent.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

Moreover, in some cases, the *abwabs* were increased in one estate to meet a deficiency in another, so that the incidence of the taxation varied in different estates, and often according to the caste and place of residence of the ryot.

They were also made a means of enhancing the rent, while it was one of the objects of Government to stop enhancements made in an arbitrary and indefinite manner.

The mode in which these *abwabs* grew up is well described by Mr. Shore in reference to the ryot's account printed above. He says, in 1789:—

"If the accounts of the same land were now examined, some additional impositions might appear. The *Zemindars* introduce them by degrees, at intervals of two, three, four or five years, and rarely attempt them for two or three years successively. Solicitation and influence are equally employed to effect the establishment of them, and a ryot, when the burden is not too heavy, will rather submit than resist or complain. Temporary extortion may be practised at any time, but a permanent exaction of this nature can rarely be established by force alone upon the ryots."[1]

It is, I think, in this sense that these cesses are said in the correspondence of that period to be arbitrary or indefinite. Thus we find them described by the officials of that period "as arbitrary impositions, vicious in mode and principle, yet extremely moderate in amount," as "claimed by no measured rule, but arbitrary indefinite expediency," as "and oppressive exaction wholly unauthorized," and a "daring encroachment on the exclusive prerogative of the Sovereignty, in levying from the subject what can only be legitimate in the form of a public supply of a necessary exigency of the State."

This too is, I think, the sense in which *abwabs* were considered as arbitrary or indefinite in the old Regulations—arbitrary, in the sense that they were unauthorised by law—indefinite, in the sense that, though levied in a certain proportion to and upon the original assessment or *asul* land tax, there was no definite rule guiding the *Zemindar* in fixing the proportion they bore to the produce of the land, nor any rule prescribed for limiting their amount.

[1] Fifth Report, Vol. I. p. 163.

They were not arbitrary in the sense that the parties had not contracted in regard to them, for at that time rent was paid, not under contract, but as a land tax, as the Government share, and according to the *pergunnah* rate, nor indefinite in amount, since every *abwab* was, as in the present suit, a determined sum, generally a certain defined share of the real land tax.

In 1772, the Hon'ble Court of Directors deprived Nawab Mahomed Reza Khan of his appointment of *Naib Dewan*, and determined to stand forth publicly themselves in the character of *Dewan*, and in the proclamation of the 14th of May of that year,[1] they laid down rules for the settlement and collection of the revenue.

Rule 10 states:—

"That the farmer shall not receive larger rents from the ryots than the stipulated amount of the *pottahs* on any pretence whatsoever, and that for every instance of such extortion, the farmer, on conviction, shall be compelled to pay back the sum which he shall have so taken from the ryot, besides a penalty equal to the same amount to the Sircar; and for a repetition, or a notorious instance of this oppression on his ryots, the farmer's lease shall be annulled."

Rule 12 states:—

"That no *mahtuts*, or assessment under the name of *mangan*, *bawrie*, *gundee sood*, or any other *abwab* or tax, shall be imposed upon the ryots; and that those articles of *abwab* which are of late establishment, shall be carefully scrutinized, at the discretion of the Committee abolished, if they are found in their nature to be oppressive and pernicious."

The rules were issued three days after the assumption of the *Dewani*, and thus the prohibition of illegal assessments was almost the first act of British Government when it assumed the revenue administration of Bengal.

The nature of them can be best understood from the terms in which they are described. Thus *mangan* in Behar, in which the land in connection with the present suit is situate, was a share of the crop given as a fee or perquisite to the headman of the village; and *sood* was an impost in order to meet the

[1] Colebrooke's Supplement, p. 19 Fifth Report, Vol. I, 4. Harrington's Analysis, Vol. II, 12.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

interest which the *zemindars* were compelled to pay on arrears of revenue; but what the rules plainly point out is that whether it be treated as an assessment or a tax, nothing beyond the ordinary rent was to be allowed.

In 1787, the Regulation regarding the assessment of revenue in Bengal was revised by Regulation VIII passed on the 8th of June of that year.[1] Section 50 runs as follows:—

"That whereas notwithstanding the orders of Government in the year 1772, prohibiting the imposition of *mahtut* or assessment, under the names of *mangan*, *hauldauri*, *moracha*, *bazee jama*, or *sood*, or any other new articles of taxation, various taxes have been since imposed, the Collector is strictly enjoined to enforce this article and prevent the imposition of any new taxes upon the ryots, and if hereafter any new tax should be imposed, the Collector, on proof of such extortion, is to decree double the amount thereof as costs of suit."

In this section it will be seen that the Legislature describes these impositions as assessments of taxes, and it gives a few examples of those impositions which were not mentioned in the Regulation of 1772.

This brings us down to the Regulation relative to the Decennial Settlement which was subsequently re-enacted in 1793 when the Permanent Settlement was sanctioned. By section 57 of Regulation VIII of 1793 it was enacted that:—

"The rents to be paid by the ryots, by whatever rule or custom they may be regulated, shall be *specifically stated* in the *pottah*, which, in every possible case, shall contain the exact sum to be paid by them."

By section 6 of Regulation IV of 1794, it was declared—

"If a dispute shall arise between the ryots and the persons from whom they may be entitled to demand pottahs, regarding the rates of the pottahs (whether the rent be payable in money or kind), it shall be determined by the Dewani Adawlut of the Zilla in which the lands may be situated, according to the rates established in the pergunnah for lands of the same description and quality as those respecting which the dispute may arise."

[1] Colebrooke's Supplement, p. 253-260. Fifth Report, Vol. I, 15. Harrington's Analysis, Vol. II, 53.

So that the Permanent Settlement and the Regulation of 1794 describe as rent, is the original ground rent assessed according to the *pergunnah* or customary rate per *bigha*; and it is at once distinguishable from the other assessments or taxes which have no relation to the customary rate or to the extent or produce of the lands by the fact that the imposition of them was not caused, nor was it pretended to be attributed to, or claimable by reason of, any change in the customary rates or in the extent or the amount of produce of the lands. Bearing this in mind, we can now understand the meaning of sections 54, 55, and 56 of the Permanent Settlement.

Section 54 of Regulation VIII of 1793 declares:—

"The imposition upon the ryots under the denomination of *abwab*, *mahtut*, and other appellations, from their number and uncertainty, having become intricate to adjust, and a source of oppression to the ryots, all proprietors of land and dependent talukdars shall revise the same in concert with the ryots, and consolidate the whole with the *asul* into *one* specific sum."

Section 55 of the Regulation enacts—

"No actual proprietor of land or dependent talukdar or farmer of land, of whatever description, shall impose any new *abwab* or *mahtut* upon the ryots, under any pretence whatever."

Now the effect of this enactment seems to be that, at the time of the Permanent Settlement, there was, or there was believed to be, a customary assessment per *bigha* for the land, which was described in the Regulations themselves as the *asul*, and that in addition to that there were added certain assessments or taxes or cesses of various kinds which the Legislature wanted to prohibit for the future, and that they proposed to bring about this result by compelling each *Zemindar* to revise the assessments or taxes then existing in concert with his ryots, and consolidate them into one specific sum which would form a new *asul*, and to absolutely prohibit any new assessment, imposition or tax in addition to the *asul* for the future—*Ramkant Dutt* v. *Gholam Nubby Chowdhry*.[1] A certain time was given for this consolidation, and if not carried out, it was declared that any action for the realization of the *abwabs* beyond the *asul* or ground rent should be non-suited.

[1] 2 Sel. Rep., 58.

1890.

Radha Prosad Singh v. Bal Kowar Kouri.

We can now easily understand the meaning of the *jamabundi* of 1279 which was relied upon by the defendant in the present case.

Names of tenants.	Land.	Lagan.	Sarak.	Batta.	Putwari's neg.	Ordinary expenses.	TOTAL.

After the name of the tenant, comes "land." Then the ground rent called "*lagan*." Then comes "*sarak*," a cess in connection with roads. Then "*batta*," a tax imposed to make up any deficiency in the currency, which has always been considered an *abwab*—*Chukan Sahoo* v. *Roop Chand* [1]; Regulation LI of 1795, section 3, clause 6. No question as to *batta*, arises in this case. Then "putwari's *neg*," a cess imposed for the payment of the putwari and declared to be an *abwab* by the decision of the Full Bench in case of *Chuttun Mahton* v. *Tilukdari Singh*.[2] Lastly the column "Ordinary expenses," a cess to cover ordinary *Zemindary* expenditure.

In accordance with the common law, and in pursuance of section 83, Regulation VIII of 1793, the *lagan* was determined by the average produce of the lands in common years. But there is no law justifying the imposition of any of the other items at all; they are in name cesses, and have no connection with the produce of the land beyond that they are calculated upon the ground rent. There is no means known to the law for determining the proportion they must bear to the rent.

According to the view which I take of the Regulations, every item in this account, except that of "*lagan*," or ground rent, is a *maktut* or *abwab* within the meaning of the Permanent Settlement Regulation, and the realization of any of it was punishable thereunder with a penalty of three times the amount.

The form of *pottah* issued to the royts at the time of the Permanent Settlement was subject to control. By section 58 of

[1] S. D. A., 1848, p. 680.
[2] I. L. R., 11 Calc., 175.

Regulation VIII of 1793, no *pottah* was valid unless it had been approved of by the Collector and registered in the Civil Court of the district. These restrictions as to form were partially removed by Regulation IV of 1794.

Towards 1812 the futility of this legislation was pressed on the Government; and as the objections to the then existing legislation cannot be better put than they are by Mr. Colebrooke, I put them in his own words. He said:—

"Another part of the subsisting revenue regulations, which appears to me to need emendation, is that which relates to the form of leases; and which annuls such engagements as may not be drawn in prescribed form. Before the enactment of the regulations connected with the Permanent Settlement of the land revenues of Bengal, a practice prevailed among landholders in this province of imposing on their ryots arbitrary cesses termed *abwabs*; being either authorized so to do by the reservations in the *pottahs*, to subject the *ryots* to such *abwabs* as might be imposed on the pergunnah generally, or else assuming that authority without the sanction of any such reservation in the leases of their tenants. To protect the peasantry from such arbitrary exactions, which had been the source of grievous oppression and of gross abuses, the regulations of the Permanent Settlement provided that no new *abwab* should be imposed on any pretence, under penalty of three times the amount; that the landholders, in concert with their tenants, should revise the *abwabs* and consolidate them with the land rents; that they should give or tender to their *ryots pottahs* prepared according to a form previously approved by the Collector and registered in the Adawlut. These rules are enforced by a provision that *pottahs* of any other form are to be held invalid. Notwithstanding this penalty, which was expected to enforce universal compliance, by rendering the written engagements of landlord and tenant void and of no effect, if there be a deviation from the prescribed form, there is reason to believe that little progress has been really made towards the general introduction of the simple and definite leases which it was thus intended to enforce. But whether generally or partially successful, or wholly ineffectual, that penalty ought, I think, to be now rescinded. There is no longer any sufficient motive for holding the landholders and tenantry of the country in this sort of pupilage,

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

prescribing to them the manner and form of their reciprocal engagements. They may be safely left to consult their mutual interests, by entering into such engagements as they may consider to be for their benefit respectively, and to reduce their agreements to writing in any form most intelligible and satisfactory to themselves or in their conviction most binding and secure. All that need be required, is that the engagements shall be definite; and it may be accordingly declared that any clause of a lease, or other engagement, reserving the power of imposing cesses or taxes, termed *abwab* or *mahtut*, or under any other denomination whotsoever, or binding the *pottah*-holder to pay any impost or addition whatsoever beyond the rent however regulated, in money or in kind, which the *pottah* or engagement specifies, shall be void and of no effect, and the Courts shall maintain the remaining definite clauses, and enforce payment of such rent, and such only, as is specifically stipulated and agreed for by the *pottah* or other engagement. Under this alteration of the existing rules, the Courts of Justice will give effect to the agreements of the parties according to their ascertained intentions, with exception only to stipulations subjecting one of the parties to arbitrary demands at the will of the other. This exception together with the prohibition actually in force against the imposition of any arbitrary cesses or *abwabs*, under whatever pretence, will entirely preclude the renewal of those oppressions and abuses which the Regulations I have proposed to modify were designed to prevent."

For these reasons Regulation V of 1812 was enacted, and of it sections 2 and 3 ran as follows :—

"SECTION 2.—Section 2, Regulation XLIV, 1793, section 2, Regulation L, 1795, and clause second, section 2, Regulation XLVII, 1803, by which the proprietors of land paying revenue to Government are precluded from granting leases for a period exceeding ten years, are hereby rescinded, and proprietors of lands are declared competent to grant leases for any period which they may deem most convenient to themselves and tenants and most conducive to the improvement of their estates.

"SECTION 3.—Such parts of Regulation VIII of 1793 and of Regulation IV of 1794 as require that the proprietors of land shall prepare *forms* of *pottahs*, and that such *forms* shall be

revised by the Collectors, and which declare that *engagements for rent* contracted in any other than that prescribed by the Regulations in question shall be deemed invalid, are hereby rescinded; and the proprietors of land shall henceforward be considered competent to grant leases to their dependent taluqdars, under-farmers and ryots, and to receive corresponding *engagements for the payment of rent* from each of those classes, or any other classes of tenants, according to such form as the contracting parties may deem most convenient and most conducive to their respective interests; provided, however, that nothing herein contained shall be construed to sanction or legalise the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mahtut* or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void; but the Court shall notwithstanding maintain and give effect to the definite clauses of the *engagements contracted* between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them."

Apparently some doubt arose as to the meaning of section 2, and this was explained in Regulation XVIII of the same year. Section 2 of this enactment declared the true meaning was that proprietors of land were "competent to grant leases for any period even to perpetuality *and at any rent* which they might deem conducive to their interest," provided that a person holding a restricted interest could not grant a lease extending beyond the term of his own interest.

This was the law in regard to rent and *abwabs* which remained in force until the passing of Act X of 1859. The avowed object in passing Regulation V of 1812 was to get rid of the necessity of having the forms of leases supervised by the Collector, but at the same time to re-state the prohibition already existing in Regulation VIII of 1793 against the landholders imposing or realizing any new *abwabs*, not to repeal them. The time for consolidating the *abwabs* existing at the time of the Permanent Settlement had passed, and they could not be reassessed as *abwabs*, but only as rent, and in those cases in which they had been consolidated with the *asul*. This it was considered would leave the ryot in the same position as he was after the passing of Regulation VIII of 1793. By section 2

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

of Regulation XVIII of 1812, the proprietors were empowered to grant leases of any form for *rent*, and by section 3 of Regulation V of 1812 they were empowered to receive from the tenants "corresponding engagements for the payment of rent," and it only. No further power was given. And as if to mark the distinction between cesses and rent, the former are referred to as paid under stipulations or reservations, the latter under engagements and it was the engagements for the payment of rent, and not the stipulations for cesses, that were to be enforced. It was not the intention of the framers to this Regulation to allow the parties to contract for any thing in money or in kind not then known as rent, and when they describe *abwabs* and *mahtuts* as arbitrary or indefinite, they were only using words applied to these assessments from 1772. Bearing this in mind a comparison of the latter portion of this section with sections 54 and 57 of Regulation VIII of 1793 shows that the words "specifically agreed" in Regulation V of 1812 are the same as "specifically stated" in section 57, and refer to the *one* specific sum of section 54 in the Permanent Settlement. They have no reference to cesses. This is the view taken by the Full Bench, in *Chuttan Mahton's case*,[1] where it is said that the last four lines of section 3 of Regulation V of 1812 refer to the ground-rent in the Permanent Settlement. That being so, I take it that every assessment of any kind beyond that entered in the second column of the *jamabundi*, which I have given above, was an arbitrary or indefinite cess within the Regulation, and prohibited by it.

These sections are partially repealed by Act X of 1859 and Act VIII of 1869, and are now wholly repealed by the Bengal Tenancy Act of 1885, but partly re-enacted by section 74 of that Act, which declares :—

"All impositions upon tenants under the denomination of *abwab*, *mahtut*, or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void."

It seems, therefore, that all additions to the actual rent, under the denomination of *abwabs*, are now, as they were in 1793, illegal, and any agreement to pay them is void. This

[1] I. L. R. 11 Calc., 175.

seems to me the conclusion arrived at by the Full Bench in the above case, which was subsequently affirmed by their Lordships of the Privy Council.

It has been argued that a different interpretation has been put upon that decision by a Division Bench of this Court in the case of *Padma Nund Singh* v. *Baij Nath Singh*.[1] In that case the plaintiff sued for rent, and two items denominated *tehwari* and *salami*, and in the plaint the claims for the different items were set out as follows :—

1. That your petitioners, the plaintiffs, are the proprietors and Zemindars of purganas Sahrai, etc., mehal Kharagpur. The defendant is the mokuraridar of mouzah Gora, etc., purgana Purbutpatra, the Zemindary of your petitioners, the plaintiffs, and pays an annual *jama* of Rs. 1,999 8 annas, besides road-cess, public works cess, *tehwari*, etc.

2. That the sum of Rs. 2,830 13 annas 3 pies on account of rent, road-cess, public works cess, *tehwari*, interest, *salami*, etc., from the year 1290 to Bysak instalment of the year 1893 Fusli * * * is due from the defendant.

For the year 1290.

	Rs.	As.	P.
Rent	1,999	8	0
Road and public works cesses ...	345	0	0
Tehwari	7	3	0
Dakbehri	40	0	0
Salami	1	9	9
Interest	82	2	0
	2,475	6	9

The Judge in the lower appellate Court dismissed the claim. He found that *salami* was a tax levied on the occasion of a *puuna*, or religious festival, and *tehwari*, another tax imposed on the occurrence of the *Doorga Pooja*, when it is customary for *Zemindars* to expend money in certain ceremonies. So that he held in so many words, that both in denomination and essence, these items were cesses. He further found that the *kabuliat* divided the amount payable into *mál*, *tehwari* and *salami*, and

[1] I. L. R. 15 Calc., 828.

1890.

Radha Prosad Singh v. Bai Kowar Koeri.

we know that in several parts of the Regulations the word *mál* is used in the sense of rent, as opposed to any excess which was styled an *abwab*. Thus in Regulation LI of 1795, section 2, clause 1, we find the words *mál* and *abwab* used in this sense. In short, the Judge found they were cesses, independent of the *mál* or rent, and only usually payable when certain ceremonies were performed. In appeal to this Court, the Division Bench decided that the items, called *tehwari*, and *salami* did form part of the rent and were recoverable because they were entered in the *kabuliat* under which the defendant held, were not arbitrary and uncertain, but specific sums which the tenant agreed to pay; and they decided that the Full Bench decision above referred to did not lay down as law that anything recoverable in 1812 could not be recovered at the present day. I agree in thinking that the Full Bench did not lay down any such doctrine, but I think that the Full Bench did lay down that these amounts were not recoverable under Regulation V of 1812. In that case the Full Bench held that in the last four lines of section 3 of Regulation V of 1812, the words "sum specified" refer to the amount of the rent specified. And it follows from the Regulation itself that all stipulations or reservations for *abwabs* or *mahtut* above the rent or *asul jama* were, after the time of the Permanent Settlement, null and void. In the case of *Pudma Nund Singh* v. *Baij Nath Singh*,[1] the sums named *tehwari* and *Salami* were in name cesses, and were found to be such by the lower Court, and this finding, so far as it depended on evidence, could not be interfered with in special appeal. Moreover, when we consider that so far back as 1772, long before the Permanent Settlement, *salami* was looked upon as an *abwab*, there can be little doubt of their nature. They were by name and nature distinct from the rent, were apparently so stated in the lease, and they were received by the landlord, not as rent, but as cesses. This distinction was marked in the plaint where they were set out by name after the rent and in sharp contrast with it. And yet the sums were decreed as rent.

The Judges said:—

"In the case before the Full Bench that Regulation did not support the plaintiffs. On the contrary, it was directly opposed

[1] I. L. R. 15 Calc., 828.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

to their claim. In the present case the Regulation does support the plaintiff's case because the items in dispute are not arbitrary and uncertain in their character, but they are specific sums which the tenant agreed to pay to the landlords; and from the terms of their *kabuliat* it seems to us that the payments of these items, no less than the payment of the *jama* itself, formed part of the consideration upon which the tenancy was created. Therefore the plaintiffs were entitled, by virtue of Regulation V of 1812, to demand and recover these items, they being in fact part of the rent agreed to be paid, although not so described. In the definition contained in the new Tenancy Act, 'rent means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land by the tenant.' There is nothing new in this, but it expresses concisely what has always been understood by the word 'rent.' What is or is not an *abwab*, must depend upon the circumstances of each particular case in which the question arises. The Full Bench case, upon which the District Judge relies, does not, as we have said, bar the plaintiff's claim."

I must respectfully dissent from this judgment, and since I do so, I think it is only due to the Judges that I should give my reasons for my dissent. In the Full Bench, as in this case, the sums were definite: in that case the sums were admitted and held to be *abwabs*: in this case the sums were entered among the cesses and declared to be cesses. I do not see clearly how the Regulation is opposed to the one claim more than the other. Nor does the Regulation require that the sums in dispute should be abitrary *and* uncertain. The words are "arbitrary *or* indefinite"; and to find that the sums are specific is not sufficient to satisfy the requirements of the law: indeed, it is opposed to two propositions laid down in the Full Bench case,—that it cannot be maintained that anything which is definite and certain is not an *abwab*, and that the last four lines of the Regulation invoked in support of this decision only refer to rent, and do not refer to *abwabs*. Nor can I bring myself to acquiesce in the proposition which, I think, is involved in the decision, that rent as defined in the Rent Act, means the consideration upon which a tenancy is created—a mere contract rent and that only. The obligation to pay rent arising out of

1868.

Radha Prosad Singh v. Bal Kowar Koeri.

contract is not found more often than the obligation to pay arsing from law. All the tenants, whether ryots or tenure-holders, whose rents have been enhanced, and all tenants in the estates settled under chapter X of the Rent Act, are bound, not by contract, but by law, to pay. In India the rights of landlord and tenant, as this very Act shows, are not wholly based on contract. They depend partly on contract, partly on law, partly on custom and usage. Moreover, assuming that the rent in the case I am now discussing depended on contract, I cannot agree with the view taken in the decision. In regard to the sums sued for in addition to that called rent, the plaintiff sued for rent by name, and additional sums which the lower Court found were in denomination and essence *abwabs*. This Court gave them as rent. It is declared by section 74 that all impositions upon tenants under the denomination of *abwab* or *mahtut* or other like appellations in addition to the actual rent, are illegal, and the stipulations and reservations for their payments are void. So that these sums do not fall within the words, "what is lawfully payable," in the definition of rent. Lastly, I am unable to assent to the proposition that the definition of rent in the Rent Act includes every specific sum which the ryot has agreed to pay. That proposition seems in conflict with the decision of the Full Bench. That certainly was not the meaning of the word rent in the old law. It certainly was not the opinion of Mr. Shore, who says :—

"With respect to land and land revenue there are two material distinctions: *first*, the lands of the country were anciently distinguished by the denomination of *Khalsa* and *Jahiri*; the former may be translated exchequer lands; the latter, which are appropriated for the maintenance of *Munsubdars*, or the officers of the State, may be denoted assigned lands. The aggregate of the two constitutes the whole of the lands paying revenue to the State. *Secondly*, the distinction with respect to land revenue is that of *asul* or original, understood to be the standard assessment, in contradiction to *abwab* or taxes subsequently imposed upon it."

In other words, before the Permanent Settlement, the *asul*, or ground rent, was only one portion of the amount payable by, and agreed to be paid by, a ryot; other portion was *abwab*.

This distinction, as I have pointed out above, runs not only through Regulation VIII of 1793, but also through other Regulations.

Regulation II of 1795, section 3, clause 2, runs as follows :—

"*Second.*—In the *pottahs* for *nukdi* land (land paying a specific money rent per *bigha*), the name and length of the measuring rod was directed to be mentioned, and as, since the year 1781, sundry new articles of *abwab* and charges had been introduced, the *pottah* provided that all new *abwabs* and charges introduced since the Fusli year 1187 should, from the year 1196 of the same era, be considered as prohibited and relinquished, and the *mal* or original rent and *abwab* or cesses which existed in that year, *viz.*, 1187 Fusli, being incorporated with the *mal* so as to form only *one* aggregate sum, this sum or specific rate should constitute what the ryots or cultivators of the *nukdi* lands were to pay per bigha."

Again, take the preamble of Regulation XXX of 1803 regarding the settlement of the ceded provinces, where it is said that in the proclamation regarding the settlement of these provinces, and in Regulation XXVII of 1803,[1] it was declared that "all persons who may enter into engagements with Government for the public revenue, shall bind themselves to grant *pottahs* to their under-renters and *ryots*," in which "all authorized *abwabs* shall be consolidated with *the land rent* (*or asul jama*) *in a gross sum*" : that counter-engagements shall be executed by the *ryots* and under-renters of a similar tenor ; and nothing but what is therein expressed shall be collected from the *ryots* or under-renters of whatever description.

The same view is set forth in Regulation VII of 1822, section 9, and it comes to this that up to the time of making a settlement, the whole amount paid by the *ryots* consisted of two portions, ground rent plus *abwabs* ; and that such of the *abwabs* as were allowed by the settlement were consolidated with the *asul* and called land rent, representing a share of the produce in contradistinction to *abwabs* or cesses. In illustration of this proposition, I set forth the lease granted under the Regulation

[1] Section 53 (11) (12).

1890.

Radha Prosad Singh v. Lal Kowar Koeri.

to the *ryots* of Benares, the province next to Behar. It is the only form mentioned in the Regulations :—

"A *pottah* or engagement and stipulation in the name of—
—according to the *zeyl without abwabs* or *serf*. The *fota* or rent for the entire year of the cultivation shall be *bilmokta* or according to one rate ; and exclusive of that neither a *daam* or dhirm will be taken.

"Zeyl or annexed specification of rent."

Nukdi or money rent.

1st Mootry, 12 bighas (either of 3 dera ilahi or purgana bighas, or dherawat or estimated bighas) at 8 rupees 2 annas per bigha—Rs. 37-8-0.

2nd. Kuyraur, etc. (being for the more valuable articles of cultivation), 13 bighas (whether of 3 dera ilahi or purgana measurement or dherawat), *viz.*,—

	Rs.	As.	P.
Sugarcane, 10 bighas, at 5 rupees 1 anna per bigha	50	10	0
Tobacco, 2 bighas, at 6 rupees per bigha ...	12	0	0
Moolee or vegetables, 1 bigha, at 2 rupees 1 anna per bigha	2	1	0
	64	11	0

F

In this lease rent is used in the sense of ground rent only, and it is on this supposition that all the elaborate rules for enhancement of rent in Act VIII of 1885 are based.

Nor do I think the express words of the Regulations, as to the consolidation of *asul* and *abwabs* into one sum, weakened by the argument that because the last four lines of Regulation V of 1812, section 3, use the words in the plural, namely, "clauses" and "engagements," the rent must consist of more than one lump sum. It is a general clause and describes every person and every thing in the plural, except rent. It must be borne in mind that the leases contain a specification of rates, and that the land could be let for a term, and there might be clauses in regard to these matters as in the lease set out above. Moreover, we know that in some Regulations, before Regulation V of 1812, when rent was consolidated into one lump sum, the engagements between *ryots* and land-holders are referred to in similar

terms. Examples of this are found in Regulation XIV of 1793, section 6, and in Regulation VII of 1799, section 15, clause 8, where the words bear a strong resemblance to those in Regulation V of 1812, although they refer to Regulation VIII of 1793.

The Judges held in the case decided by the Full Bench that there was no definition of *abwabs* in the Regulations, and hence that it must be decided in each case whether any sum is or is not an *abwab*. It is true that there is no express definition of *abwab* in the Regulation. Yet, as the whole demand on a tenant is frequently declared to be the ground rent and *abwab*, the latter must be that portion of the demand not included in the ground-rent. This too was the meaning attached to it in 1813, one year after the passing of Regulation V of 1812. In this year a glossary of legal terms was compiled in the East India House in London for the assistance of English readers of the Fifth Report, and in it *abwab* is defined as follows:

"This term is particularly used to distinguish the taxes imposed subsequently to the establishment of the *asul*, or original standard rent, in the nature of the addition thereto. In many places they had been consolidated with the *asul*, and a new standard assumed as the basis of succeeding impositions."

This is, I think, an accurate definition of the term *abwab* as found in the Regulations, and it should serve as a guide to us in deciding cases; and certainly, if it be correct as I think it is, the cesses in this case and in the case under discussion were *abwabs*.

It is for these reasons I respectfully dissent from the decision in *Pudma Nund Singh* v. *Baij Nath Singh*.[1] It seems to me to be in direct conflict with the decision of the Full Bench, and that both judgments cannot co-exist as an exposition of the same law. I think the sums of *tehwari* and *salami* stipulated to be paid were *abwabs*, and the stipulation to pay them was void.

I may add in support of the view of the Full Bench decision the case referred to by the Judges of the Full Bench, *viz.*, the case of *Radha Mohun Surma Chowdhry* v. *Gunga Pershad Chuckerbutty*.[2] There the *zemindar* sued the farmers for Rs. 7,542-13-4 under the head of *Zabita batta*, *i.e.*, an excess of a

[1] I. L. R., 15 Calc., 828.

[2] 7 Sel. Rep. N. S., 166.

1880.

Radha Prosad Singh v. Bal Kowar Koeri.

half anna in each rupee on the amount of the farming *jama* under their *Kabuliat*, dated 22nd Bysack, 1231. That suit was dismissed. Three Judges of the Sudder Dewani Adawlut in giving judgment held as follows :—

"The *Kabuliat* provides that the farmers should pay such sums, over and above the stipulated *jama*, as are realized in the mofussil under the head of *Zabita batta*. Section 3, Regulation V, 1812, provides that the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mahtut*, or other denomination, is illegal, and that all stipulations of that nature should be judged by the Courts to be null and void."

This case, in my opinion, bears a strong analogy to the case of *Padma Nund Singh* v. *Baij Nath Singh*, [1] and it affirms the principle that all agreements of the nature referred to in that case are null and void. The answer to the question referred to the Full Bench must, I conceive, be that the amounts sued for under the head of *sarak*, *neg* and *khurach* are *abwabs*, and are not therefore, recoverable, and the appeals should be dismissed.

PRINSEP, J.—I am of the same opinion.

PIGOT, J.—I entirely agree.

GHOSE, J.—This was a suit for rent for the years 1290 to 1293, at the rate of Rs. 22-2 annas per year. The defence was that the yearly rent was not Rs. 22-2 annas, but Rs. 18-10-6; and that the difference between Rs. 22-2 annas and Rs. 18-10-6 was made up of certain illegal cesses such as *sarak*, *batta*, *neg* and *khurach*, which could not be legally recovered.

The suit was instituted after the Bengal Tenancy Act came into operation.

The main question upon which the parties went to trial in the Courts below was whether the rent was Rs. 22-2 annas or Rs. 18-10-6; and upon this question both the Courts below found in favour of the defendant. They were of opinion that the "actual rent" was Rs. 18-10-6, and that although the defendant had for many years paid very nearly at the rate of Rs. 22-2 annas, still that sum was made up of the rent and illegal cesses; that these cesses had not been consolidated with the rent in accordance with the provision of Regulation VIII of 1793, and that therefore they could not be recovered as rent.

[1] I. L. R. 15 Calc., 828.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

The learned Judge has, however, held that *hatta* is not an illegal cess, and it can therefore be recovered; and he has reserved to the plaintiff the liberty of bringing a seperate suit for *neg*.

The plaintiff appealed to this Court and the Division Bench, before whom the case came on for hearing, has referred the following question to a Full Bench, *viz* :—

"Whether the portions of the claim that are objected to as coming under the denominations *sarak*, *neg*, and *khurruck* are illegal cesses, or whether they are recoverable as rent by reason of their having been paid for a long time along with rent without any specification in the rent receipts."

It appears to me that upon the finding of fact arrived at by both the Courts below, the appeal ought to fail; and the question as to the legality or otherwise of the items of *sarak*, *neg* and *khurruck* hardly arises in this second appeal. The question between the parties was, what was the *rent* of the tenure held by the defendant; and it has been found that it was Rs. 18-10-6, and not Rs. 22-2 annas, and that the difference between these two figures was no part of the rent of the tenure, though paid along with it, and could not therefore be recovered as such.

But as the majority of the Judges who compose the Full Bench think that the question should be answered, I briefly state my views.

Section 74 of the Bengal Tenancy Act provides as follows :—

"All impositions upon tenants under the denomination of *abwab*, *mahtut*, or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void."

And "rent" is defined in section 3 (5) to mean "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land." This definition, as I understand it, expresses in different words, what has always been understood by the word "rent," *viz.*, the consideration to be paid for the occupation of land by a tenant.

In this case the actual rent is found to be Rs. 18-10-6 only; and the other items claimed are what had been levied in previous

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

years, under the denomination of *sarak*, *khurach*, etc., in addition to the rent.

There is nothing to show that those items ever formed any part of the consideration for which the land was leased to the defendant; for if they did, they would, I think, be really *rent*, though described in the *Zemindari* papers under other denominations. They were apparently *abwabs* imposed subsequent to the rent being fixed at Rs. 18-10-6; and it is not proved that the *ryot* at any time agreed to pay an enhanced rent including the said items as part of the rent.

The word *abwab* is not defined either in the Bengal Tenancy Act, or in the Regulations which have been repealed by that Act. When the East India Company obtained the *Dewani* of Bengal, they found that a variety of taxes, called *abwabs*, *mahtuts*, etc., had been indiscriminately levied in addition to the *asul* or original ground rent by the Government from the *Zemindars*, as also by the "Zemindars" from the ryots. And from the reports that were submitted by the officers of the Company, after investigation into the Revenue System, it would appear that in the time of the Emperor Akbar, a *tumar jama* or standard assessment was fixed upon the principle of division of the gross proceeds between the soverign and the ryots in certain proportions. This standard assessment was from time to time augmented. But notwithstanding this standard assessment, various taxes were subsequently imposed upon the *ryots* by the farmers of the land revenue (*Zemindars*), as also by the *subahdars* (Viceroys) upon these farmers. And these taxes were called *abwab jama* in contradistinction to the *asul jama*, or original rent, at which the land was supposed to have been rated in the time of Akbar or an ancient rent fixed at some later period. The *subahdary abwabs* were, it is said, generally levied upon the standard assessment in certain proportions from the *Zemindars*, and the latter were authorized to collect them from the ryots in the same proportions; but, as a matter of fact, the *Zemindars* were left to their own discretion and arbitrary will to make any new demands as they pleased, and there was no fixed rule or principle in levying these impositions. (See Harington's Analysis, Vol. II, pages 19, 69, and the 5th Report to the House of Commons, Vol. I, pages 103, 105 to 108, 275, 292, 300 and 391.)

In the year 1772 (14th May) a Regulation [1] was passed, whereby it was declared that a settlement should be made for five years; that the farmers should not receive larger rents from the ryots than the stipulated amount of the *pottahs*; that the payments made by the farmers to Government should, in like manner, be ascertained and established; and that no *mahtuts* or assessments under the denomination of *mangan*, *sood*, etc., or any other *abwab* should be imposed upon the *ryots*, and those articles of *awab* which were of recent establishment should be scrutinized, and such as might be found to be oppressive and pernicious should be abolished, and that all *nuzzurs* and *salamis* be totally discontinued (Arts. 10 to 13).

In the same year, the Committee of Circuit, while making a settlement for five years in some parts of Bengal, found it necessary "to form an entire new *hustabud* or explanation of the diverse and complex articles which were to compose the collections," these consisting of the *asul* or original ground rent and the *abwabs*. Such *abwabs* which appeared to be most oppressive were abolished, and the rest were retained, they being considered part of the "neat rents." And in order to prevent the farmer from eluding the restriction imposed, the Committee prepared forms of *pattahs* which the farmers were to give to the *ryots*, specifying the conditions of the lease and the "separate heads or articles of the rent." (See Haringtion's Analysis, Vol. II, pages 19 and 20).

Subsequently in the year 1787 (8th June), another Regulation [2] was passed, by the 50th article of which it was declared that, whereas, notwithstanding the orders of Government in 1772 prohibiting the imposition of *mahtut* or assessment, various taxes had since been imposed, the Collector should be enjoined to enforce that article, and that if any new taxes be imposed, he was to decree to the party injured double the amount extorted.

We then find that Lord Cornwallis, while recommending a Permanent Settlement of Revenue in Bengal, stated in his Minute, referring to Mr. Shore's Minutes on the subject, that——

"the rents of the *ryots*, by whether rule or custom they may be demanded, shall be specific as to their amount; that the

[1] Colebrooke's Supplement, 100. Fifth Report, Vol. I, 4. Harington's Analysis, Vol. II, 13.

[2] Harington's Analysis, Vol. II, 184. Fifth Report, Vol. I, 615.

1890.

Radha Prosad Singh v. Rai Kowar Koeri.

landlords shall be obliged to grant *pottahs*, in which this amount shall be inserted, and that no *ryot* shall be liable to pay more than the sum actually specified in the *pottah*.[1]

And—

"every *abwab* or tax imposed over and above that sum is not only a breach of that agreement, but a direct violation of the established laws of the country." [2]

Further on he says:—

"the Zemindar may sell the land, and the cultivator must pay to the purchaser. Neither is prohibiting the landholder to impose new *abwabs* or taxes on the lands in cultivation tantamount to saying to him that he shall not raise the rents of his estate. The rents of an estate are not to be raised by the imposition of new abwabs**." [3]

The policy of the Government then was, as I gather from what has been already noticed, that whatever may be payable as rent should be specified in the *pottah* to be granted by the landlord, and that no *new abwabs* should be imposed.

We then find that in section 54 of Regulation VIII of 1793, it was laid down that—

"the impositions upon the *ryots* under the denomination of *abwab*, *mahtut* and other appellations, from their number and uncertainty, have become intricate to adjust, and a source of oppression to the *ryots*; all proprietors of land and dependent *talukdars* shall revise the same in concert with the *ryots* and consolidate the whole with the *asul* into one specific sum."

The next section 55 provides that—

"no actual proprietor or dependent *talukdar*, or farmer of land, shall impose any new *abwab* or *mahtut* upon the *ryots* **."

Section 57 lays down that—

"the rents to be paid by the *ryots*, by whatever rule or custom they may be regulated, shall be specifically stated in the *pottah*, which in every possible case shall contain the exact sum to be paid."

Section 58 provides that the proprietor of the land or dependent *talukdar* shall prepare the form of *pottahs* to be

[1] Harington's Analysis, Vol. II, 183. Fifth Report, Vol. I, 614.

[2] Harington's Analysis, Vol. II, 184. Fifth Report, Vol. I, 615.

given to the *royts*, and obtain the approbation of the Collector. Section 61 says that in the event of any claims being preferred by any proprietor or *talukdar* on engagements wherein the consolidation of the *asul*, *abwab*, etc., shall appear not to have been made within the time limited by section 54, they are to be non-suited.

This was the law until the year 1812. The object that the Legislature had in view in 1793 was to put down the imposition of *new abwabs*, and to make it compulsory upon the landlords to consolidate the then existing *abwabs* with the rent. And probably, they intended also that there should be but one sum, including all the items of payment, fixed and specified in the *pottah* as the rent. But then section 3, Regulation V of 1812, in the first place rescinds so much of the Regulations of 1793, which provided that the proprietors and *talukdars* should prepare forms of *pottahs*, and obtain the sanction of the Collector thereto, and authorizes them to grant *pottahs* in such forms as the contracting parties might agree to, and it then lays down as follows :—

"Provided, however, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mahtut*, or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void; but the Courts shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them."

It will be observed that the section prohibits the *imposition* of *arbitrary* and *indefinite* cesses, and says that any reservation or stipulation of *that* nature shall be null and void. And the words which follow are to my mind very significant as showing what they really intended to lay down. I think their intention was to provide that if the parties agree to any specific and definite sum or sums as consideration for the lease, such agreement shall be enforced. The expression "such sums as may have been specifically agreed upon" should be read as it were in contradistinction to the words "imposition of arbitrary or indefinite cesses." As I have already stated, when the East India

1890.

Radha Prosad Singh v. Bai Kowar Koeri.

Company assumed the *Dewany*, they found after enquiry that a variety of taxes under the denomination of *abwab*, *mahtut*, etc., were being indiscriminately levied by the *Zemindars* according to their own will and discretion, without any fixed rule or principle. And it was the policy of the Government to put a stop to such arbitrary and indefinite impositions, and to prohibit the levying of *new abwabs*. If the construction I have put be not correct, I fail to see with what object the last portion of the section beginning with the words "but the Courts shall notwithstanding, etc.," was put in; for accepting the opposite view to be correct, these words would, I think, be superfluous.

In the case of *Chuttan Mahton*,[1] decided by the Full Bench of the Court, Mr. Justice Mitter (and his judgment was concurred in by Tottenham and Pigot, JJ.) observed as follows:—"Although the Regulations did not clearly define what an *abwab* is, still I think that it cannot be maintained that anything which is definite and certain is not an *abwab* under the Regulations, although the parties to the contract call it so. It seems to me that the Regulations, without defining clearly what an *abwab is*, left this question to the determination by the Court in each case upon the evidence. I cannot find anywhere in the Regulation the precise definition of the word *abwab*, which would justify me to treat the disputed items of claim as part of the specified rent, although the plaintiffs claim them in the plaint and entered them in the *Zemindary* accounts as *abwabs*."

In that case the plaintiff claimed to recover a certain amount as rent, as also certain other items as "customary *abwabs*" as having been prevalent in the village from time immemorial. It was contended that these *abwabs* had existed from before the Permanent Settlement, and were therefore recoverable, notwithstanding the provisions of section 54, Regulation VIII of 1793, and further that they were not *abwabs*, although claimed as such in the plaint, but part of the rent. The Full Bench negatived both these contentions, and Mr. Justice Mitter held, as already mentioned, that what was an *abwab* must be left to the determination by the Court in each case upon the evidence; but that in the case before them he could not hold that the disputed items were part of the rent. No doubt that learned Judge in a

[1] I. L. R., 11 Calc., 175.

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

subsequent passage, while referring to the last four lines of section 3, Regulation V of 1812, *viz.*, "but the Courts shall notwithstanding maintain and give effect to the definite clauses in the engagements contracted between the parties, or, in other words, enforce payment of such sums as may have been specifically agreed upon between them," says that "the words 'sum specified' refer to the amount of the rent specified." But this passage must be read with what had preceded, and which I have already referred to.

The Judicial Committee in affirming that decision observed as follows :—

"The first question seems to be this : Are these payments over and above rent, properly so called, *abwabs* within the meaning of the word as used in the Regulation VIII of 1793 ?

"They are described in the plaint as '*old usual abwabs*,' and they are described as *abwabs* in the *Zemindary* accounts. It appears to their Lordships that the High Court were perfectly right in treating them as *abwabs* and not as part of the rent. Unquestionably they have been paid for a long time—how long does not appear. They are said to have been paid according to long-standing custom ; whether that means that they were payable at the time of the Permanent Settlement or not is not plain. If they were payable at the time of the Permanent Settlement, they ought to have been consolidated with the rent under section 54, Regulation VIII of 1793. Not being so consolidated they cannot now be recovered under section 61 of that Regulation. If they were not payable at the time of the Permanent Settlement, they would come under the description of new *abwabs* in section 55 ; and they would be in that case illegal. * * * "

What the Judicial Committee say is simply this : plaintiff expressly claims these items as *abwabs* ; if they existed at the time of the Permanent Settlement, they should have been consolidated with the rent under section 51, Regulation VIII of 1793 ; if they were not payable at that time, they are *new abwabs*, and therefore illegal under section 55. And they further say that the High Court were right in treating them as *abwabs* and not as part of the *rent*.

I do not understand that they intended to go any way beyond what Mr. Justice Mitter said in his judgment, and to lay down,

1890.

Radha Prosad Singh v. Bal Kowar Koeri.

as it is said they did lay down, that nothing, save and except *one* sum, including every item of payment, could be recovered as payable for the occupation of land; and that an agreement to pay anything beyond *that* sum, although it might be a lawful consideration for the lease, could not be enforced.

It appears to me that if in any given case the Court finds that any particular sum specified in the lease or agreed to be paid, is a lawful consideration for the use and occupation of any land, that is to say, if it is really part of the rent, although not described as such, it would be justified in holding that it is not *abwab*, and is recoverable by the landlord.

And it is somewhat from this point of view that the case of *Padma Nund Singh* [1] was decided. That was a case of permanent *mokurari* lease executed before the Bengal Tenancy Act, and under which the defendant agreed to pay a certain amount as rent, and two other items of Rs. 9 and 2, respectively designated as *tehwari* and *salami towzi*. The Division Bench (Tottenham and Ghose, JJ.), before which the case came on for hearing, proceeding upon the provisions of section 3, Regulation V of 1812, held that the items objected to, *viz.*, *tehwari* and *salami*, were recoverable, because they were not arbitrary and uncertain in their character, but specific sums which the tenant had agreed to pay; and because these sums formed part of the consideration for the lease, and were in fact part of the rent agreed to be paid, though not described as such. The case was decided upon the terms of section 3, Regulation V of 1812, and not with reference to section 74 of the Bengal Tenancy Act, the lease having been executed before that Act was passed. The judgment in the case was delivered by Tottenham, J., who was one of the Judges who formed the Full Bench in case of *Chultan Mahton*. [2] And I may here observe that it was not intended thereby to hold that anything that is not arbitrary and indefinite is recoverable, although it may not be part of the *rent*. In that case, both the elements were supposed to be present, *viz.*, that the items in question were not of an arbitrary or indefinite character; and secondly, they formed part of the rent agreed to be paid. I am, however, bound to say that having since more carefully considered the subject, I have come to the opinion that we were not

[1] I. L. R., 15 Calc., 828.

[2] I. L. R., 11 Calc., 175.

right in holding that the items of *tehwari* and *salami* were part of the *rent* stipulated to be paid under the lease. They were, I now think, *abwabs*.

As regards the items of *sarak* and *khuruch* claimed in the case now before us, it seems to me that, although they had been realized in previous years at certain rates, still the amounts are not definite, and they may vary according to circumstances; and if the rent is not permanent, they would be augmented with the increase of rent—*Radha Mohun Surma Chowdhry* v. *Gunga Pershad Chuckerbutty*. But however that may be, the question is whether under the Bengal Tenancy Act (section 74) they may be recovered. The Judge of the Court below has found, as a matter of fact, that they are no part of the "actual rent," and it follows therefore that they are not recoverable.

As regards *neg*, I should also think that it cannot be recovered in this case, because it is no part of the rent.

Appeal dismissed.

NOTE.

Reference should be made to the Full Bench decision in the case of *Chaltan Mahton* v. *Tilakdhari Sing*, I. L. R. 11 Calc. 175, F. B., which was subsequently affirmed by the Judicial Committee, I. L. R. 17 Calc. 131, P. C.; L. R. 16 I. A. 152. That decision lays down that in spite of a contract to the contrary nothing is realisable as *abwab* in addition to the rent, even though the *abwab* may have been amicably collected for a long time, and alleged to have been paid according to long-standing custom. The essence of the matter is that all additions to the actual rent are illegal and any agreement to pay them is void. Questions may however arise upon the construction of a particular lease as to whether a particular item is a part of the rent and recoverable as such or whether it is an illegal addition to the rent, and therefore not recoverable. See *Radha Charan* v. *Goloke Chandra*, I. L. R. 31 Calc. 834.

[1] 7 Sel. Rep. N. S., 166.

MOHESH NARAIN
v.
NAWBUT PATHAK.

[*Reported in I. L. R., 32 Calc., 837; 1. C. L. J. 437.*]

1905.
April 18.

The following judgments were delivered by

HARINGTON, J.—The question arising in this appeal relates to the rights of a co-sharer against a person who holds a lease under other co-sharers. Having refused to join in granting the lease, can he enforce any rights against the lessee under the other co-sharers, in respect of the user of the joint property?

The appeal is filed by Mohesh, one of the plaintiffs in the Court below, against a decision of the Sub-Judge awarding him royalty to the extent of $\frac{6}{16}$ths on all materials removed by the defendant Nawbut from the Tinpahar quarries, there is also a cross objection filed on behalf of Nawbut, who contends that he is not liable to render an account to the plaintiff or to pay royalty on the stone gotten.

The plaintiff was one of the joint-owners of an estate which comprised the hill known as Tinpahar Hill, in which the defendant worked a quarry.

At one time Nawbut had held a lease from all the joint-owners, which had expired before suit. There had been quarrel with Mohesh, and the result of an extremely complicated series of transactions was that at the time the suit was brought Nawbut was, as the learned Sub-Judge has found, a lessee under half the proprietors, Mohesh who with his co-plaintiffs represented a six-annas share, *i.e.*, 2 annas ancestral share of himself and the minor plaintiffs, and four annas, acquired under a lease from a four anna co-sharer, having declined to join in the lease to Nawbut. It is unnecessary to discuss the respective titles of Mohesh and Nawbut, because the Sub-Judge's finding is not questioned on this point.

Mohesh gave Nawbut notice not to quarry stones on Tinpahar Hill. Nawbut under his lease from the other proprietors claimed a right to quarry there, and declined to comply with the notice.

[1] *Present*: Harington, J. and Mookerjee, J.

1905.

Mohesh Narain v. Nawbut Pathak.

The result was that the present suit was brought and the plaintiffs alleging that the stones cut and quarried were the undivided property of themselves and the second party defendants, amongst whom are the defendant Nawbut's lessors, claimed an account against the first party defendant Nawbut of all the stones quarried and carried away from Tinpahar Hill, an injunction and damages.

The learned Judge was of opinion that the plaintiff was entitled to an account and having found what the prevailing rate of royalty for stone was, directed the defendant to render an account of the stones and to pay to the plaintiff $\frac{6}{16}$ths of the royalty calculated at the prevailing rate.

For the purposes of this case the lessee must be regarded as being in precisely the same position as his lessors, if therefore Mohesh was entitled to damages or an injunction against his co-sharers or to call on them to render him an account of the stone gotten, then he is entitled to enforce those rights against the lessee; if on the other hand that which has been done by the lessee would, if done by the co-sharers, have given Mohesh no right of action against them, then he can have no rights as against the lessee.

On behalf of the plaintiff appellant it is contended that Mohesh had one undivided six-annas share of the stone in the quarry and is therefore entitled to have an account taken as was done in *Job* v. *Potton*,[1] of the profits of the stone gotten and payment over his six-annas share. On the other hand it is contended by the defendant respondent that there is ample room on the hill for Mohesh to get stones, if he so wishes, and that in as much as the lessee has not quarried any thing, approaching a ten-annas share of the stone, there is ample remaining to satisfy Mohesh's six-annas share if he will only take it.

The case of *Job* v. *Potton*,[1] relied on by the appellant, is of rather a peculiar nature; in that case the lessee of two undivided third shares worked coal from a mine belonging to three co-owners. He agreed with the two co-owners, who were his lessors to pay a royalty, and having got coal he accounted to his lessors for royalty calculated on two-thirds of the amount of coal which he got, and he kept in hand a sum equivalent to the

[1] (1875) L. R. 20 Eq. 84

1905.

Mohesh Narain v. Nawbut Pathak.

royalty on one-third of the coal, which he got, and that sum he set apart for the third co-owner, who had not joined in granting a lease, and he left unworked in the mine an amount equivalent to that third co-owner's one-third of the coal. In a suit by the third co-owner it was held by Bacon, V. C., that, although the lessee had acted within his strict rights, he was liable to render an account to the plaintiff of one-third of the value of all the coal brought to the pit's mouth less the cost of bringing it there.

This decision turned on the principle enunciated in the Statute 4 Anne c. 16 section 27, by which it is enacted that one joint-tenant or tenant-in-common shall have an action of account against the other as bailiff for receiving more than comes to his just share.

It was not the defendant's case that he had only taken the two-thirds of the coal, which he was entitled to take under his lease and had left in the mine one-third to be gotten by the plaintiff. Had that been his case he must have accounted to his lessors for a royalty calculated on all the coal, which he brought to the pit's mouth. By accounting to them for two-thirds only of the royalty on all the coal mined, and by setting aside one-third of the royalty for the plaintiff, the lessee admitted that he had received more than two-thirds which came to his just share under his lease, and therefore under the Statute of Anne he was held liable to account.

In the present case the defendant does not admit that he has received more than his just share, so even if the principle enunciated in the Statute of Anne could be applied in this country the case would not be on all fours, it being here the defendant's case that he has taken no more of the profits of the hill that he is entitled to take under his lease.

In the present case, on what does the plaintiff base his claim? He cannot succeed in trespass because there has been no actual ouster: he cannot bring trover because there has been no destruction of the common property. The proper and legitimate use of the hill is to quarry stone on it. Having used the common property in the way in which it is proper to use it, no action in trover will lie, even if the lessee should have got more than his share from the hill. I am unable to see how he can call for an account unless under some express or implied contract: and for such contract there was no consideration.

If the quarry proved an unprofitable investment the plaintiff says he could not have been called on to share the expense of quarrying the stone.

To affirm the proposition that the plaintiff was entitled to an account would be to say that one of several co-sharers might stand by and refuse to cut stone on the joint hill because it might prove that the stone would not cover, when sold, the cost of cutting but he might see his co-sharer invest his capital in using the joint property in a legitimate way, and say, "I will not help to bear your losses, if the quarry does not pay but I will have a proportion of your profits if your enterprise proves profitable."

I cannot see how such a position can be supported, unless the co-sharer has a right to restrain his co-sharer from taking the stone, or has a cause of action against him in trespass or trover in which case it might be said that a forbearance to enforce those rights formed a consideration for a promise to account for the profits. But he has no right of action in trover or trespass or to an injunction :—see *Jacobs* v. *Seward*.[1]

I am not prepared to assent to the proposition that every piece of stone is after severance the joint property of all the co-sharers. I think that Nawbut is entitled to all the profits which his own enterprise and industry enable him to get from the joint property as he has left it open to the other co-sharers by a similar exercise of industry and enterprise to appropriate to themselves profits from the joint property not less than their undivided share of the whole.

In *Henderson* v *Eason*[2] it was held that a co-tenant was not to be held to have received more than his share under the Statute of Anne, because he had received by employing on the joint property his own capital and industry, the whole of the profits ; it does not follow therefore, that Nawbut has received more than his share of the joint property, because he has appropriated to himself all the stone which by his own industry and capital he has taken from the joint property.

In my opinion Mohesh has no right to damages or to an account against Nawbut. He has not been ousted from the joint property nor has the joint property been destroyed. Mohesh

[1] (1872) L. R. 5 H. L., 464.
[2] (1854) 17 Q. B., 701.

1905.

Mohesh Narain v. Nawbut Pathak.

can quarry stones for himself and so obtain his share of the joint property.

There is no implied contract, to account to Mohesh for a share of the stone quarried for that must rest on the proposition that an undivided six-annas share of the stone was quarried for Mohesh's benefit at his implied request. If that were so, there must be an implied promise by Mohesh to pay for the cost of quarrying his six-annas share, whether the quarrying is a paying concern or not. It is Mohesh's case that he is under no such liability.

The judgment and decree of the Subordinate Judge in favour of the plaintiff must be set aside and the suit dismissed.

The judgment in favour of the defendant on his claim for Rs. 175 as against the plaintiff has not been questioned and must stand.

A large portion of the paper-book, *i.e.*, from pages 75-956 is unnecessary and the cost of that is not allowed.

We assess the hearing fee at Rs. 300.

MOOKERJEE, J.—I agree with my learned brother that the decree made by the Subordinate Judge is erroneous and must be reversed.

The facts, which have given rise to the litigation out of which the present appeal arises, in so far as they are necessary for the decision of the principal question argued before us, do not admit of any reasonable doubt or dispute. The plaintiff appellant and the second party defendants respondents, are the owners of a well known hill in Rajmehal, named Tinpahar, partly as Zemindars and partly as lessees. The hill was leased out by the owners to the defendant first party, who is the principal respondent to this appeal, for the purpose of quarrying and selling stones, under two successive leases, the first of which was for a term of two years, and the second for a term of three years, which expired on the 12th April, 1897. Upon the termination of the second lease, the first party defendant, Nawbut Pathak, obtained a fresh settlement from the co-sharers of the plaintiff in respect of their undivided ten-annas share, but the plaintiff declined to renew the engagement in respect of his six annas. Nawbut, however, continued quarrying operations as before. On the 9th July, 1897, the plaintiff served a notice upon Nawbut asking him to stop the works and to render an

1905.

Mohesh Narain v. Nawbut Pathak.

account of all stones quarried since the expiration of the previous lease; to this Nawbut paid no heed, and, on the 17th April, 1900, the plaintiff commenced this action against Nawbut and his lessors (the co-sharers of the plaintiff), for an injunction to restrain him from further quarrying and carrying away the stones, for an account of all stones quarried since the 12th April, 1897, and for the recovery of Rs. 5,200 as the value of the plaintiff's share in such stones. The defendants resisted the claim, on the grounds, among others, that they had only exercised lawfully their rights as tenants-in-common, that there had been neither any ouster of the plaintiff nor any assertion of hostile title as against him, that the plaintiff was quite welcome to carry on quarrying operations on his own account, that as Nawbut had quarried much less than $\frac{1}{16}$ths of the stones in the entire hill, the plaintiff had no right to claim either account or damages, and that in any event, the plaintiff could not ask for anything more than his proportionate share of the rent. Nawbut also included in his written statement, under section 111 of the Civil Procedure Code, a claim to set off against the demand of the plaintiff Rs. 175 alleged to be due to him from the plaintiff. The learned Subordinate Judge held that the plaintiff was entitled to claim an account and also his share of the value before severance of all the materials quarried and disposed of; he further held that such value must be determined upon the basis of the prevalent rates of royalty for fashioned and unfashioned stones. The accounts were then taken, and, it was found that the plaintiff was entitled to Rs. 369, against which the first defendant was entitled to set off Rs. 175. A decree was accordingly made in favour of the plaintiff for the recovery of the difference, Rs. 194, with proportionate costs. Against this decree, plaintiff has appealed to this Court, mainly on the ground that the damages have been assessed on an erroneous principle, and, the first defendant has presented a memorandum of cross-objections under section 561 of the Code of Civil Procedure on the ground amongst others, that the plaintiff has no cause of action and is not entitled to any relief at all. The question raised on behalf of the respondent, namely, the extent and character of the right of a co-owner to the enjoyment of joint property, is one of great importance and, if answered against the apppellant, would render unnecessary

1905.

Mohesh Narain v. Nawbut Pathak.

any discussion of the principles upon which the damages ought to be assessed. But the subject is by no means free from difficulty as the right of a co-tenant to occupy and use quarries or mines, has rarely formed the subject of judicial discussion and decision; after a careful examination, however, of the arguments advanced on both sides, I have arrived at the conclusion that the position taken up by the respondent is well-founded on reason and principle, and must be upheld.

The learned Vakil for the respondent has contended that every co-owner of joint property has a right to the reasonable enjoyment thereof in some of the ordinary methods of reaping profits from property of like character and under suitable circumstances, and, that so long as his use does not amount to ouster of his co-tenant or to the destruction, partial or entire, of the joint property, the law does not impose upon him an obligation to render an account to his co-sharer. In support of this position, reliance is placed upon a passage from Knapp on Partition, page 447, and also another passage from Freeman on Co-tenancy and Partition, 2nd edition, section 249 A, where that learned author summarises the law on the subject as follows: "As a general proposition, each co-tenant is entitled to use, and every co-tenant is forbidden to injure or destroy the common property. Every use, however, involves some slight injury or destruction, and, in the case of mining property, there can be no valuable use without a removal, and, in effect, a destruction of a part of the common property. Some of the co-tenants may desire to operate the mine, while the others may be unwilling to do so. The property is obviously of no value, except for the purposes of sale, unless it can be used; and the only use which its owners ever contemplated for it, and of which it is susceptible, consists of the removal from it of some part of its only element of value. Through such removal its value must be diminished, and, if sufficiently long continued, must be exhausted. The co-tenants, who desire to use the mine, must either be deprived of all use thereof, or if allowed to use, must assume all risk and expense, and incur the liability to account with the others in case the use proves profitable, or the non-assenting co-tenants must either join in the mining operations, or submit to use by the others, which will consume or destroy a part of the property. As a mine already opened must have

been intended to be used, and in its use to be finally mined out, and as the co-tenants must have acquired their interests in contemplation of and subject to this use, and as each co-tenant is generally entitled to such use of the common property as is consistent with its character and circumstances, the better rule seems to be that, if some of the co-tenants choose not to enter upon and work the mine, they can neither enjoin the others from so doing, nor compel to account after having so done." The learned Vakil for the appellant, on the other hand, has contended that one of the co-tenants of a mine or quarry cannot grant a valid license to a stranger to enter and work the same and remove the materials, that the exercise of such right is an invasion of the rights of the non-assenting co-tenants, and, that the licensee is liable to account for and pay the proportionate price of all coal or stone removed by him; in support of this proposition, reliance is placed upon the case of *Job* v. *Potton*.[1] In my opinion, the position taken up by the appellant cannot be successfully maintained upon the principles which regulate the enjoyment of joint property, nor is it in reality supported by the case referred to, which, although it may at first sight seem to favour the contention, will be found on closer examination, to be distinguishable by reason of one circumstance which completely differentiates it from the case now before me. In that case, the plaintiff, a tenant-in-common of a coal mine, had notice of a negotiation, which was followed by a lease for three years (in which he did not join) by his two co-tenants, in December, 1865, of two undivided thirds of the coal with license to work the same. Under this license some coal, but considerably less than two-thirds of the whole, was raised, and one-third of the royalty was kept by the licensee for the plaintiff. A negotiation for a further license was on foot, when in October, 1872, the plaintiff filed a bill against his co-tenants and the licensee, praying for an enquiry as to the value of the coals raised, and an account against all the defendants as trespassers, for an injunction and receiver, and for damages. Meanwhile, the co-tenants of the plaintiff instituted a suit against him for partition, and, a decree for partition of the estate had already been made, when the plaintiff's suit came on for hearing in 1875. It further appears that in the partition suit, the plaintiff had not asked the Court to take into consider-

[1] (1875) L. R. 20 Eq., 84.

1906.

Mohesh Narain v. Nawbut Pathak.

ation the fact that two of the co-owners, through their licensee, had carried away a part of the inheritance, and the partition had been effected on the assumption that the three co-owners were entitled in equal shares to the residue of the coal. Under these circumstances, Sir James Bacon, V.C., held that it was not destructive waste for a tenant-in-common of a coal mine to get, or to license another to get, the coals, if the working tenant does not appropriate to himself more than his share of the proceeds, that the working in this case did not consequently amount to a trespass, and the plaintiff, electing to dismiss the bill as against his co-tenants, was entitled to a decree against the licensee for an account of the value at the pit's mouth of the coal raised, less costs of getting and raising, and for payment of one-third to plaintiff. It is obvious that any other decree might have led to manifest injustice. Relief might have been refused to the plaintiff on one of two grounds, namely, that he might ask for a partition and accounts as against his co-tenants, or that he was at perfect liberty to work the mine on his own account as enough of coal had been left untouched to correspond to his proportionate share in the undivided property. Neither alternative, however, was admissible under the circumstances; not the first, because the co-tenants of the plaintiff had already called for a partition and a division had been effected without any allowance made for the fact that two of the co-owners had carried away a part of the inheritance; nor the second, because from the date of the partition decree, the estate had ceased to be joint property and must be considered to have been divided into three parts, one of which alone belonged to the plaintiff. The decree in the partition suit did, therefore, introduce an element of disturbance, the existence of which could not be ignored, and, if the suit had been dismissed, the plaintiff would have been left without a remedy, which would have been neither just nor necessary. I am unable to hold, therefore, that Sir James Bacon intended to lay down as a broad proposition of law that if one of two co-tenants of a mine, works it reasonably and properly, without the consent of the other, but at the same time without any assertion of hostile title, and does not take more than his legitimate share of the whole property, he is still liable to render an account to his co-owner. Such a position as this seems to me not only indefensible, on

principle, but opposed to authorities to which I shall presently refer, and, also inconsistent with observations contained in the judgment of the learned Vice-Chancellor himself. For instance, in one portion of his judgment, he observes as follows: "No authority has been referred to and I believe that none can be found to say that the rights of tenants-in-common in a mine, are not as extensive as can be suggested for each of those tenants to do what he wills with the undivided property, provided always that he does not take more than his share. The Statute of Anne (4 Anne, c. 16, Sec. 27) has recognised that principle, and every decision, which I know of, has adopted it as a principle. What difference is there between a tree growing, which the Court refuses to prevent a tenant-in-common from cutting at his pleasure, although it is a part of the inheritance, and a tree which by some operation of nature has become carbonized and turned into cannel coal? How is a tenant-in-common to enjoy his share, if that is the right expression, of the common property in a coal mine, if he is not at liberty to dig and carry away the coal? The only restriction upon him is that he must not appropriate to himself more than his share." Now, the Statute of Anne, to which reference is made in this passage, expressly limits actions of account by one joint tenant or tenant-in-common against another, to cases in which "the latter had, as bailiff, received more than came to his just share or proportion," and, it appears to me that, but for the especial circumstance of the partition decree, the defendant would not have been made liable to account to the plaintiff, as he had taken considerably less than two-thirds of the entire coal and had left enough for the plaintiff to work upon. Indeed, the licensee defendant, upon his own admission that he had reserved a proportionate share of the royalty had, in substance, admitted his liability to account, and, the only question which, in reality, required the decision of the Court, was as to the principle upon which the plaintiff's dues were to be calculated. I must hold accordingly that the case of *Job* v. *Potton*[1] cannot rightly be regarded as an authority in support of the broad proposition which the learned Vakil for the appellant invites us to accept, but where the liability to account has been

[1] (1875) L. R., 20 Eq. 84.

1905.

Mohesh Narain v. Nawbut Pathak.

established, the rule embodied in it may be applied to assess the amount of damages.

The view of the rights and liabilities of co-tenants, which I have indicated, appears to me to be well-founded on principle. It is perfectly true that in the case of immovable property jointly owned, each co-owner is in theory interested in every infinitesimal portion of the subject-matter, and each has the right, irrespective of the quantity, of his interest, to be in possession of every part and parcel of the property, jointly with the other, or in the language of Lord Coke, "their occupation is undivided, and neither of them knoweth his part in several" (Co-Litt. Sec. 292). But it does not follow that every use of joint property by one co-owner renders him liable to an action for account to the other, even though the use is perfectly legitimate and does not constitute an invasion of the rights of the co-sharer. If there is no assertion of hostile title, no exclusion or ouster, obviously an action of ejectment cannot lie; if there is no destruction of the property, no conversion, an action of trover is not the appropriate means of redress; nor does an action of account lie unless it is alleged and proved that the co-tenant has received more than his just proportion. In the case of mining properties, the only mode in which they may be profitably used is to take from them valuable ores, and, if this is done properly by one co-tenant, so as not to interfere with the exercise in a similar manner of the equal right of the other co-tenant, I do not see upon what ground a liability may be imposed upon the one to account to the other. Indeed, if the contrary view prevailed, there would be no mutuality, and enjoyment of joint property would be impracticable; one co-owner might by expenditure of capital and labour reap advantages which he would be obliged to share with the other, but, if he incurred any loss, he would not be entitled to throw the burden upon his co-sharer. I am fortified in the view I take by the principle deducible from the decision of the Exchequer Chamber in *Henderson* v. *Eason*,[1] reversing the decision of the Queen's Bench *Eason* v. *Henderson*,[2] and the decision of the House of Lords in *Jacobs* v. *Seward*,[3] affirming the decision of the Court of Exchequer Chamber.[4] In the first of

[1] (1851) 17 Q. B., 701.
[2] (1848) 12 Q. B., 986.
[3] (1872) L. R. 5. H. L., 464.
[4] (1869) L. R. 4 C. P. 328.

these two cases, Mr. Baron Parke, after pointing out that if there are tenants-in-common, and one tenant alone possesses the property, he is, under the Statute of Anne, answerable as bailiff to his co-tenant in an action of account, if he receives more than comes to his just share, but not otherwise, observed as follows: "There are many cases where profits are made and are actually taken by one co-tenant, yet it is impossible to say that he has received more than comes to his just share. For instance, if one tenant employs his capital and industry in cultivating the whole of the piece of the land, the subject of the tenancy, in a mode in which the money and labour expended greatly exceeds the value of the rent or compensation for the mere occupation of the land,—in raising hops for example, which is a very hazardous adventure,—and he takes the whole of the crops, is he to be accountable for any of the profits in such a case, where it is clear, if the speculation had been a losing one altogether, he could not have called for a moiety of the loss, as he would have been entitled to do, had it been so cultivated by the mutual agreement of the co-tenants? In taking all the produce, he cannot be said to receive more than his just share and proportion to which he is entitled as tenant-in-common, as he receives in truth the remuneration for his own labour and capital, to which a tenant has no right." In support of this view, the learned Judge refers to the opinion expressed by Lord Cottenham in *McMahon* v. *Burchell*,[1] that one tenant-in-common of a dwelling house, by keeping out of the actual occupation of the premises, cannot convert the other into his bailiff, in other words, cannot prevent the other from occupying them except upon the terms of paying him rent,—an opinion, which I may add, was followed by Lord Macnaghten in his speech before the House of Lords in *Kennedy* v. *De Trafford*.[2] In the second of the two cases referred to, *Jacobs* v. *Seward*,[3] where the whole produce of the common property, a crop of hay, had been cut in due season and carried away by one tenant-in-common, it was held that the other could not maintain trespass against him, as the removal of the growing crops did not in law amount to an ouster of the tenant-in-common. Lord Hatherley after pointing out that

[1] (1846) 2 Ph., 127 (134); 41 Eng. Rep. 889.
[2] (1897) A. C., 180 (190).
[3] (1872) L. R. 5 H. L. 464.

1905.

Mohesh Narain v. Nawbut Pathak.

so long as a tenant-in-common is only exercising lawfully the rights he has as tenant-in-common, no action can lie against him by his co-tenant, added that where the act done is right in itself, and nothing is done which destroys the benefit of the other co-tenant-in-common of the property, "there no action will lie, because he can follow that property so long as it is in existence and not destroyed; if it is sold, another question arises under the Statute of Anne." The Lord Chancellor referred in support of this view to the case of the whale, *Fennings* v. *Lord Grenville*[1] where it was held that the conversion of a chattel (captured whale) by a tenant-in-common to its general and profitable application (turning into oil), though it changed the form of the substance, is not a destruction of the subject matter, and consequently trover would not lie under such circumstances. See also *Denys* v. *Shuckburgh*.[2]

The foundations of the doctrine applicable to cases of this description are fully examined and clearly set forth in two recent cases before the American Courts. In the first of these, *Kean* v. *Connelly*[3] the question arose between two tenants-in-common of a field, of whom one owned an undivided two-thirds, and the other the remainder. The defendant, who had cut grass growing upon the land, was sued by the plaintiff, who owned an one-third share, for one-third of the value of the grass appropriated; he denied liability, alleging that he had not taken more than his fair share, and that he was not guilty of any ouster of the plaintiff, who had been in no way hindered from entering upon the Common premises and enjoying the same. Mr. Justice Berry, who delivered the judgment of the Supreme Court of Minnesota, held that the plaintiff was not entitled to succeed, and after referring to the cases of *Henderson* v. *Eason*,[4] and the *McMahon* v. *Burchell*,[5] quoted the following passage from Freeman on Co-tenancy, section 258 as containing an accurate statement of the law on the subject: "As each co-tenant has at all times the right to enter upon and enjoy every part of the common estate, this right cannot be

[1] (1808) 1 Taunt 241; 9 R. R. 760.
[2] (1840) 4 Y. & C Exch. 42; 54 R. R. 446.
[3] (1878) 25 Minn. 222; 33 Am. Rep. 458.
[4] (1851) 17 Q. B., 701.
[5] (1846) 2 Ph. 134.

impaired by the fact that another of the co-tenants absents himself, or does not choose to claim his right to an equal and common enjoyment; it would be inequitable to compel a co-tenant in possession to account for the profits realized out of his skill, labour and business enterprise, when he has no right to call upon his co-tenant to contribute anything towards the production of these profits, nor to bear his proportion, when, through bad years, failure of crops, or other unavoidable misfortunes, the use made of the estate resulted in a loss, instead of a profit, to the one in possession." In the second case, *Mc Cord* v. *Oakland Quicksilver Mining Company*,[1] the reasoning which underlies this decision was applied to the case of a mine, and it was held that, where one of several tenants-in-common of a mine is working it in the usual way, and not excluding his co-tenants, he cannot be called upon to account to them in an action for damages as for waste, nor restrained from thus working the mine. Mr. Justice Mckinstry, who delivered the judgment of the Supreme Court of California, after an elaborate review of the authorities, English and American, observed as follows: "The tenant-in-common of a mine may occupy it for the purpose contemplated by all, even though a portion of the soil or ore be removed. Each tenant has the right to use the mine, and, as was intimated by the Supreme Court of Pennsylvania in *Irwin* v. *Covode*,[2] so long as an estate is used according to its nature, it is no valid objection that the use is consumption, and it is no fault of the tenant that it is not more endurable. The taking of ore from the mine is rather the use than the destruction of the estate; the results of the tenants' labour and capital are in the nature of proceeds or profits, the partial exhaustion being but the incidental consequence of the use." The learned Judge then dealt with the question of the grant of an injunction restraining the defendant from proceeding with the mining operations, and after holding that the injunction must be refused, continued as follows: "The occupation by one tenant, so long as he does not exclude his co-tenant, is but the exercise of a legal right. The money he invests at his own risk; if his transactions result in a loss, he cannot call upon his co-tenant for contribution,

[1] (1883) 64 Calif. 134; 49 Am. Rep. 686.

[2] (1854) 24 Pa. 162.

1903.

Mohesh Narain v. Nawbut Pathak.

and if they result in a profit, his co-tenant is not entitled to share in such profit. The demand of the plaintiffs is not for a sum due by way of rent from defendant as the tenant of their interest, nor is it for a proportionate share of an amount received by the defendant for the use and occupation of the premises by third persons, nor is an account sought as an incident to a claim for partition, nor is the present an action brought to recover a portion of the profits acquired by the expenditure of defendant's money, treating him as the agent of plaintiffs in developing the common property. There is no pretence of an averment of any actual contract between plaintiffs and defendant, whereby the latter was authorized to act for the former. On the contrary, it is expressly alleged in the complaint that the acts of defendant were against the will of plaintiffs and without their consent. If the appropriation by the defendant of the net proceeds of his enterprise be considered as merely the legitimate perception of the profits, the action cannot be maintained as an action for an account." The view set forth in these two cases is substantially in agreement with that taken by the Court of Appeals of New York in *Le Barron* v. *Babcock*,[1] and is not inconsistent with that adopted in the cases of *Early* v. *Friend*,[2] *Bird* v. *Bird*,[3] *Annely* v. *De Saussure*,[4] *Holloway* v. *Holloway*,[5] and *Appeal of Fulmer*,[6] which are all distinguishable on the common ground that in each, the co-owner, who was called upon and directed to render accounts, had been in possession of the joint property to the ouster or exclusion of his co-tenant. In the last of these cases, the Supreme Court of Pennsylvania laid down that as between tenants-in-common of an opened and developed slate quarry, the compensation which the tenant out of possession is entitled to receive from the tenant in possession taking out slate, is to be measured by the market value of the slate in place or in a state of nature; but from an examination of the judgment it appears that the Court was not called upon

[1] (1890) 122 New York 153; 19 Am. St. Rep. 488.
[2] (1860) 19 Grattan. 21; 78 Am. Dec. 649.
[3] (1875) 15 Fla. 424; 21 Am. Rep. 296.
[4] (1887) 26 South Car. 497; 4 Am. St. Rep. 725.
[5] (1888) 97 Miss. 628; 10 Am. St. Rep. 339.
[6] (1889) 128 Pa. 24; 15 Am. St. Rep. 662.

to decide the question of the liability of the co-tenant in possession to render an account of profits, because the parties agreed that there was such liability, founded apparently upon a Statute of 1850, which subjects tenants-in-common in possession of mineral lands to accountability to their co-tenants for minerals taken out. I may further add that the case of *Murray* v. *Haverty*,[1] in which it was held that one of the co-tenants of a coal mine cannot grant a valid license to a stranger to enter, mine for, and remove coal, on the ground that the exercise of such right is an invasion of the rights of the non-assenting co-tenants, was, as pointed out in *McCord* v *Oakland Q. M. Co.*[2] decided upon the special provisions of a Statute, which authorized a tenant to bring trespass or trover against his co-tenant, who should "take away, destroy, lessen in value or otherwise injure" the common property.

Upon a review of these authorities, I think the following propositions are deducible :—

(1) A tenant-in-common cannot be held liable to his co-tenant for damage for use and occupation of the joint property, unless there has been waste or an ouster of his co-tenants.

(2) When the tenant in possession has prevented his co-tenant from obtaining from the premises such profits as they were capable of yielding, or has taken possession of the whole and used them as his own, and, thereby made a profit, he must account, either for the fair rental value of the profits, or be liable for mesne profits ; for one tenant is bound to account to another only as his bailiff, under contract express or implied.

(3) Where one tenant-in-common occupies the joint property, without any assertion of hostile or exclusive title on his part, and without claim on the part of his co-tenants to be admitted into possession, he is under no obligation to account, for he has a right to such occupancy.

If these principles are applied to the facts of the case before me, the conclusion is irresistible that the plaintiff cannot succeed ; he does not complain of ouster or exclusion from the enjoyment of the joint property, nor is there the remotest suggestion that the defendant has taken more than his

[1] (1873) 70 Illinois 320.
[2] (1883) 64 Calif. 134 ; 49 Am. Rep. 686 (691).

1905.

Mohesh Narain v. Nawbut Pathak

share of the total quantity of stone, for as the learned Subordinate Judge puts it, a dozen centuries of quarrying will not visibly affect the hill. Under these circumstances, I must hold that the plaintiff is not entitled to any relief.

Reference was made at the Bar to the cases of *Watson* v. *Ramchand*,[1] *Lachmeswar* v. *Manowar*,[2] and *Balvantrav* v. *Ganpatrav*.[3] None of these, it is conceded, is directly in point; the first case is clearly distinguishable, as the tenant-in-common in possession had occupied more than his share of the land, and was made liable to pay compensation; the second and third cases, so far as they go, support the view taken by me. In the second case,[4] Lord Hobhouse, in reversing the decree of the High Court, which had directed an account of the profits, observed: "But if the defendant's use of the landing places and the river is consistent with joint possession, why should the plaintiffs have any of the profits? They have not earned any, and none have been earned by the exclusion of them from possession, as was done by the Watsons in the case cited. By the defendant's acts they have lost nothing and have received some substantial convenience. It will be time enough to give them remedies against him, when he encroaches on their enjoyment." In the third case,[3] Mr. Justice West held that a co-tenant may lawfully enjoy the whole property in any way not destructive of its substance so as to amount to an ouster of the other co-tenants, and whatever a co-tenant may do himself, he may license another to do, so that, if all the co-tenants are exercising acts of possession, their rights *inter se* would be to an account of the profits realised and a distribution of them according to their proportions of the ownership.

The result, therefore, is that the appeal must be dismissed and the cross objection decreed; the suit will stand dismissed with costs in this Court and the Court below. As the right of the defendant to the 175 rupees claimed by way of set-off has not been disputed before us, he is entitled to a decree for that sum, with interest at 6 per cent. per annum from the date of

[1] (1890) I. L. R., 18 Calc., 10.
[2] (1891) I. L. R., 19 Calc., 253.
[3] (1883) I. L. R. 7 Bom. 336.
[4] (1891) I. L. R. 19 Calc. 253., at p. 265.

the written statement to the date of realization. The hearing fee in this Court is assessed at Rs. 300. The cost of preparation of that portion of the paper-book, which consists of the account-books, must be disallowed, as they were wholly unnecessary for the purposes of the appeal.

Appeal dismissed. Cross-objection allowed.

NOTE.

Reference may be made to the case of *Annada Chander* v. *Parbati Nath*, 4 C. L. J., 198, in which the question was discussed of the right of a co-owner to ask for demolition of buildings erected on joint lands by his co-sharers. It was pointed out that the plaintiff who complains of the act of his co-owner cannot obtain a decree for demolition of buildings or for joint possession unless he can establish that he has sustained some substantial injury by reason of the act of which he complains; the Court will not interfere unless it is proved that injury has accrued to the plaintiff by reason of the erection of the building, and that he took reasonable steps in time to prevent the erection.